

1-21-2011

Benz v. D.L. Evans Bank Supplemental Brief Dckt. 37814

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Benz v. D.L. Evans Bank Supplemental Brief Dckt. 37814" (2011). *Idaho Supreme Court Records & Briefs*. 2769.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2769

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

LESLIE BENZ,)	
	)	Supreme Court No.
Plaintiff/ Respondent,)	
	)	37814
vs.)	
)	
D.L. EVANS BANK,)	
)	
Defendants/Appellant.)	
)	

SUPPLEMENTAL RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine.

HONORABLE ROBERT J. ELGEE, DISTRICT JUDGE

JANET C. WYGLE
PO Box 1172
Ketchum, Idaho 83340

R.C. STONE
P. O. Box 910
Burley, Idaho 83318

Attorney for Plaintiff/
Respondent

Attorney for Defendants/
Appellant

VOLUME 1 of 1

37814

TABLE OF CONTENTS

Register of Actions		1
Stipulation Regarding Trustee's Sale	1/26/2010	10
Order Regarding Trustee's Sale	2/1/2010	13
Affidavit of Janet Wygle's Interest Calculations for Order of Summary Judgment	5/14/2010	16
Memorandum of Costs and Affidavit of Attorney's Fees and Costs	5/18/2010	20
Objection to Plaintiff's Order for Summary Judgment	5/20/2010	35
Motion to Disallow Costs	5/27/2010	39
Objection to Interest	5/27/2010	42
Memorandum in Opposition to Request for Attorneys Fees and Prejudgment Interest	5/27/2010	45
Responsive Brief in Support of Request for Attorney's Fees and Costs and Prejudgment Interest	6/18/2010	50
Motion for Attorney's Fees Pursuant to IRCP Rule 37(c) and Notice of Hearing Thereon	7/12/2010	61
Affidavit of Janet C. Wygle in Support of Motion for Attorney's Fees Pursuant to IRCP Rule 37 (c)	7/12/2010	64
Order on Application for Costs and on Objections to Attorney's Fees and Interest	7/12/2010	82
Brief in Support of Motion for Attorney's Fees Pursuant to IRCP Rule 37(c)	7/23/2010	87
Affidavit of R.C. Stone in Opposition to IRCP 37(c) Motion	7/26/2010	94
Memorandum in Opposition to IRCP 37(c) Motion	7/26/2010	107
Decision on Attorney Fees for Failure to Admit Pursuant to Rule 37(c)	10/4/2010	118
Order 1) Making Additions to and Deletions form the Clerk's Record; 2) Correcting the Current Transcript; and 3) For Additional Transcript of Hearings	10/26/2010	126
Second Amended Judgment	2/8/2011	130
Clerk's Certificate		133
Certificate of Service		134

INDEX

Affidavit of Janet C. Wygle in Support of Motion for Attorney's Fees Pursuant to IRCP Rule 37 (c)	7/12/2010	64
Affidavit of Janet Wygle's Interest Calculations for Order of Summary Judgment	5/14/2010	16
Affidavit of R.C. Stone in Opposition to IRCP 37(c) Motion	7/26/2010	94
Brief in Support of Motion for Attorney's Fees Pursuant to IRCP Rule 37(c)	7/23/2010	87
Certificate of Service		134
Clerk's Certificate		133
Decision on Attorney Fees for Failure to Admit Pursuant to Rule 37(c)	10/4/2010	118
Memorandum in Opposition to IRCP 37(c) Motion	7/26/2010	107
Memorandum in Opposition to Request for Attorneys Fees and Prejudgment Interest	5/27/2010	45
Memorandum of Costs and Affidavit of Attorney's Fees and Costs	5/18/2010	20
Motion for Attorney's Fees Pursuant to IRCP Rule 37(c) and Notice of Hearing Thereon	7/12/2010	61
Motion to Disallow Costs	5/27/2010	39
Objection to Interest	5/27/2010	42
Objection to Plaintiff's Order for Summary Judgment	5/20/2010	35
Order 1) Making Additions to and Deletions form the Clerk's Record; 2) Correcting the Current Transcript; and 3) For Additional Transcript of Hearings	10/26/2010	126
Order on Application for Costs and on Objections to Attorney's Fees and Interest	7/12/2010	82
Order Regarding Trustee's Sale	2/1/2010	13
Register of Actions		1
Responsive Brief in Support of Request for Attorney's Fees and Costs and Prejudgment Interest	6/18/2010	50
Second Amended Judgment	2/8/2011	130
Stipulation Regarding Trustee's Sale	1/26/2010	10

Other Claims

Date		Judge
8/12/2009	New Case Filed - Other Claims	Robert J. Elgee
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Wygle, Janet Receipt number: 0011908 Dated: 8/12/2009 Amount: \$88.00 (Check) For: Benz, Leslie Smith (plaintiff)	Robert J. Elgee
	Complaint to Foreclosed Vendee's Lien and ro Order of Sale, And/Or for Breach of Contract Filed	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to East Avenue Bluff; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to DL Evans Bank; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Timeless Design Company; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Cliff R Iverson; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Fisher Appliance, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Viewpoint, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to CAD Drafting Systems, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to A.C. Houston Lumber Company; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Mike Punnett; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Precision Plumbing, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Watson Builders, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Harris Refrigeration Heating & Electric; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Ferguson Enterprises, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Rocky Mountain Hardware, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Sweet~'s Portable Waste Services, LLC; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to White Builders, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee

Other Claims

Date		Judge
8/12/2009	Summons: Document Service Issued: on 8/12/2009 to Mike~'s Welding && Metal Works, LLC; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Sentinel Fire && Security, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Steven W Mccoy; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Christopher Brennan; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Service Issued: on 8/12/2009 to Paul M. Cooper; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
8/19/2009	Affidavit Of Service/East Ave.	Robert J. Elgee
	Summons: Document Returned Served on 8/13/2009 to East Avenue Bluff; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service/Watson Builders INC.	Robert J. Elgee
	Summons: Document Returned Served on 8/13/2009 to Watson Builders, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 8/13/2009 to Rocky Mountain Hardware, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service/Rocky Mountain	Robert J. Elgee
	Summons: Document Returned Served on 8/13/2009 to Viewpoint, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service/Viewpoint, Inc.	Robert J. Elgee
	Summons: Document Returned Served on 8/14/2009 to Timeless Design Company; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service/Timeless Design	Robert J. Elgee
	Affidavit Of Service/Buckhorn Electric	Robert J. Elgee
8/20/2009	Summons: Document Returned Served on 11/10/2009 to A.C. Houston Lumber Company; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
8/25/2009	Answer	Robert J. Elgee
8/26/2009	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Parsons, Smith & Stone Receipt number: 0012234 Dated: 8/26/2009 Amount: \$58.00 (Check) For: Benz, Leslie Smith (plaintiff)	Robert J. Elgee
	Defendant: DL Evans Bank Appearance R.C. Stone	Robert J. Elgee
8/27/2009	Notice Of Appearance	Robert J. Elgee
	Defendant: Brennan, Christopher Appearance R. Jeff Stoker	Robert J. Elgee
8/28/2009	Notice of filing of D.L. Evans Bank's first request for production of documents to plaintiff	Robert J. Elgee

Other Claims

Date		Judge
8/28/2009	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Beard St Clair Receipt number: 0012289 Dated: 8/28/2009 Amount: \$30.00 (Check)	Robert J. Elgee
	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Jeff Stoker Receipt number: 0012296 Dated: 8/28/2009 Amount: \$58.00 (Check) For: Brennan, Christopher (defendant)	Robert J. Elgee
9/3/2009	Notice Of Service of Plaintiffs First Interrogatories, Requests for Admission and Request for Production of Documents to Defendant D.L. Evans Bank	Robert J. Elgee
	Notice Of Service of Plaintiffs Response to Defendant D.L. Evans Banks First Reqeust for PProduction of Documents to Plaintiff	Robert J. Elgee
9/10/2009	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Benjamin A. Worst Receipt number: 0012568 Dated: 9/10/2009 Amount: \$58.00 (Check) For: Buckhorn Electric, LLC, (defendant)	Robert J. Elgee
	Notice of Entry of Appearance	Robert J. Elgee
	Defendant: Buckhorn Electric, LLC, Appearance Benjamin W. Worst	Robert J. Elgee
9/11/2009	Notice Of Filing of D.L. Evans Banks Response to Reqeust for Admissions	Robert J. Elgee
9/14/2009	Notice Of Taking Deposition Duces Tecum	Robert J. Elgee
	Notice Of Appearance	Robert J. Elgee
9/15/2009	Defendant: Ferguson Enterprises, Inc., Appearance Jason G. Dykstra	Robert J. Elgee
	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Meuleman Mollerup Receipt number: 0012684 Dated: 9/15/2009 Amount: \$58.00 (Check) For: A.C. Houston Lumber Company (defendant)	Robert J. Elgee
10/9/2009	Amended Notice of Deposition DUCes Tecum	Robert J. Elgee
10/15/2009	Second amended notice of deposition duces tecum	Robert J. Elgee
10/26/2009	Notice of filing DL Evans Bank's response to request for production	Robert J. Elgee
11/6/2009	Motion to Compel Answers to Interrogatories Propounded to Defendant D.L. Evans Bank and Notice of Hearing Thereon	Robert J. Elgee
	Motion to Compel Answers to Interrogatories Propounded to Defendant D.L. Evans Bank and Notice of Hearing Thereon	Robert J. Elgee
	Affidavit of Janet C. Wygle in Support of Motion to compel	Robert J. Elgee
11/9/2009	Hearing Scheduled (Motion to Compel 12/08/2009 02:00 PM)	Robert J. Elgee
11/10/2009	Affidavit Of Service-A.C. Houston Lumber	Robert J. Elgee
	Affidavit Of Service-Ferguson	Robert J. Elgee
	Affidavit Of Service-Paul Cooper	Robert J. Elgee
	Affidavit Of Service-Brennans Carpet	Robert J. Elgee
	Affidavit Of Service-Sweets Portable Waste	Robert J. Elgee
	Affidavit Of Service-Cliff	Robert J. Elgee
	Affidavit Of Service-Precision Plumbing	Robert J. Elgee
	Summons: Document Returned Served on 8/19/2009 to Cliff R Iverson; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee

Other Claims

Date		Judge
11/10/2009	Summons: Document Returned Served on 8/18/2009 to Precision Plumbing, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 8/20/2009 to Ferguson Enterprises, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 8/21/2009 to Sweet~'s Portable Waste Services, LLC; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 8/21/2009 to Christopher Brennan; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 8/29/2009 to Paul M. Cooper; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
11/12/2009	Notice Of Intent To Take Default-Buckhorn	Robert J. Elgee
	Notice Of Intent To Take Default-Ferguson	Robert J. Elgee
	Notice Of Intent To Take Default-Christopher Brennan	Robert J. Elgee
	Application for entry of defaults & default judgments against consenting defendants	Robert J. Elgee
	Acceptance Of Service & consent to entry of default (McCoy's Painting)	Robert J. Elgee
	Consent to entry of default (View Point Inc)	Robert J. Elgee
	Consent to entry of default (Rocky Mountain Hardware)	Robert J. Elgee
	Consent to entry of default (Precision Plumbing Inc)	Robert J. Elgee
	Acceptance Of Service & consent to entry of default (Harris Refrigeration)	Robert J. Elgee
	Acceptance Of Service & stipulation for entry of default (Mike's Welding & Metal Works)	Robert J. Elgee
11/18/2009	Affidavit Of Service	Robert J. Elgee
	Summons: Document Returned Served on 11/13/2009 to Mike Punnett; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service Fisher Appliance	Robert J. Elgee
	Affidavit Of Service-white-Builders	Robert J. Elgee
	Summons: Document Returned Served on 11/13/2009 to White Builders, Inc; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Summons: Document Returned Served on 11/13/2009 to CAD Drafting Systems, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
	Affidavit Of Service-CAD Drafting	Robert J. Elgee
	Summons: Document Returned Served on 11/13/2009 to Fisher Appliance, Inc.; Assigned to Returned to Counsel for Service. Service Fee of \$0.00.	Robert J. Elgee
11/19/2009	Notice of Filing pf D.L. Evans Banks Objection and Answers to Plaintiffs First Interrogatories	Robert J. Elgee
11/25/2009	DEFAULT JUDGMENT against certain defendants (Rock Mtn Hardware, Steve McCoy dba McCoy's Painting, View Point Inc, Harris Refrigeration, Precision Plumbing, Mike's Welding)	Robert J. Elgee

Other Claims

Date		Judge
11/25/2009	Civil Disposition entered for: Harris Refrigeration Heating & Electric, Defendant; McCoy, Steven W, Defendant; Mike's Welding & Metal Works, LLC, Defendant; Precision Plumbing, Inc, Defendant; Rocky Mountain Hardware, Inc, Defendant; Viewpoint, Inc., Defendant; Benz, Leslie Smith, Plaintiff. Filing date: 11/25/2009	Robert J. Elgee
12/1/2009	Hearing result for Motion to Compel held on 12/08/2009 02:00 PM: Hearing Vacated/per Lubovski Wygle Fallowfield fax	Robert J. Elgee
12/31/2009	Notice of Trial Scheduling	Robert J. Elgee
	Hearing Scheduled (Clerk's Status 01/14/2010 04:59 PM)	Robert J. Elgee
1/12/2010	Motion for Stay of D.L. Evans Foreclosure Sale and Notice of Hearing	Robert J. Elgee
	Memorandum in Support of Motion for Stay of Foreclosure Sale	Robert J. Elgee
	Affidavit of Janet C. Wygle in Support of Motion for Stay of Foreclosure	Robert J. Elgee
1/13/2010	Hearing Scheduled (Motion to Stay 01/25/2010 04:00 PM)	Robert J. Elgee
	Affidavit in Support of Application for Entry of Defaults and Default Judgment for Certain Defendants	Robert J. Elgee
	Application for Entry of Default and Default Judgment against Certain Defendants	Robert J. Elgee
	Response to Notice of Trial Scheduling	Robert J. Elgee
1/14/2010	Amended Response to Notice of Trial Scheduling	Robert J. Elgee
1/22/2010	Memorandum in Opposition to Plaintiff's Motion for Stay of Sale	Robert J. Elgee
	Affidavit of Lucas Wait in Opposition to Motion to Stay Sale	Robert J. Elgee
	Affidavit of R.C. Stone in Opposition to Motion to Stay Sale	Robert J. Elgee
1/25/2010	Court Minutes Hearing type: Motion to Stay Hearing date: 1/25/2010 Time: 4:01 pm Courtroom: Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: D201 Party: DL Evans Bank, Attorney: R.C. Stone Party: Leslie Benz, Attorney: Janet Wygle	Robert J. Elgee
	Affidavit of R.C. Stone	Robert J. Elgee
	Hearing result for Motion to Stay held on 01/25/2010 04:00 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: Mr. Stone via telephone less 100	Robert J. Elgee
1/26/2010	Default against Certain Defendants	Robert J. Elgee
	Default Judgments against Certain Defendants	Robert J. Elgee
	Stipulation regarding Trustee's Sale	Robert J. Elgee
1/27/2010	Hearing Scheduled (Scheduling Conference 02/08/2010 10:00 AM)	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
2/1/2010	Order Regarding Trustee's Sale	Robert J. Elgee

Other Claims

Date		Judge
2/8/2010	Court Minutes Hearing type: Scheduling Conference Hearing date: 2/8/2010 Time: 10:02 am Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: D202 Party: DL Evans Bank, Attorney: R.C. Stone Party: Leslie Benz, Attorney: Janet Wygle Hearing result for Scheduling Conference held on 02/08/2010 10:00 AM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee
2/9/2010	Hearing Scheduled (Pretrial Conference 05/03/2010 01:30 PM)	Robert J. Elgee
	Hearing Scheduled (Court Trial 05/25/2010 09:00 AM) 3 day	Robert J. Elgee
	Notice Of Hearing	Robert J. Elgee
	Civil Case Scheduling Order, Notice of Trial Setting and Initial Pretrial Order Motions	Robert J. Elgee
2/19/2010	Notice of filing of DL Evans Bank's supplemental response to Plt's first interrogatories	Robert J. Elgee
	Notice of filing of DL Evans Bank's supplemental response to request for production of documents	Robert J. Elgee
3/4/2010	Stipulation to Vacate Trial Date	Robert J. Elgee
3/5/2010	Continued (Court Trial 06/29/2010 09:00 AM) 3 day	Robert J. Elgee
	Order vacating Trial Date	Robert J. Elgee
4/5/2010	Motion for summary judgment	Robert J. Elgee
	Notice Of Hearing on Plt's motion for summary judgment	Robert J. Elgee
	Affidavit of Janet C. Wygle in support of motion for summary judgment	Robert J. Elgee
	Brief in support of motion for summary judgment	Robert J. Elgee
	Hearing Scheduled (Motion for Summary Judgment 05/03/2010 01:30 PM) Plt's motion	Robert J. Elgee
4/19/2010	Motion to Strike and in Limine	Robert J. Elgee
	Notice Of Hearing on Motion to strike and in Limine	Robert J. Elgee
	Brief in Opposition to Motion for Summary Judgment	Robert J. Elgee
	Affidavit of R.C. Stone	Robert J. Elgee
	Affidavit of Ken Nelson	Robert J. Elgee
	Affidavit of Bruce Hunsaker	Robert J. Elgee
4/20/2010	Hearing Scheduled (Motion in Limine 05/03/2010 01:30 PM)	Robert J. Elgee
4/26/2010	Pretrial Statement	Robert J. Elgee
	Reply Brief in Support fo Motion for Summary Judgment	Robert J. Elgee
4/30/2010	Supplemental Pretrial Statement	Robert J. Elgee
	Plaintiff's Pre-Trial Memorandum	Robert J. Elgee

Other Claims

Date		Judge
5/3/2010	Court Minutes Hearing type: Motion for Summary Judgment Hearing date: 5/3/2010 Time: 1:39 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: D211 Party: DL Evans Bank, Attorney: R.C. Stone Party: Leslie Benz, Attorney: Janet Wygle Hearing result for Motion in Limine held on 05/03/2010 01:30 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: more 100 Hearing result for Motion for Summary Judgment held on 05/03/2010 01:30 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: Plt's motion more 100 Hearing result for Pretrial Conference held on 05/03/2010 01:30 PM: Hearing Vacated	Robert J. Elgee
5/4/2010	Hearing result for Court Trial held on 06/29/2010 09:00 AM: Hearing Vacated 3 day	Robert J. Elgee
5/14/2010	Affidavit of Janet Wygle's Interest Calculation For Order of Summary Judgment	Robert J. Elgee
5/18/2010	Memorandum of Costs and Affidavit of Attorneys Fees And Costs	Robert J. Elgee
5/19/2010	Order of Summary Judgment Civil Disposition entered for: DL Evans Bank, Defendant; Benz, Leslie Smith, Plaintiff. Filing date: 5/19/2010 STATUS CHANGED: Closed	Robert J. Elgee Robert J. Elgee Robert J. Elgee
5/20/2010	Objection to Plaintiff's Motion for Summary Judgment	Robert J. Elgee
5/27/2010	Motion to Disallow Costs Objection to Interest Notice of Hearing on Motion to Disallow Costs and Objection to Interest Memorandum in Opposition to Request for Attorneys Fees and Prejudgment Interest	Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee
6/2/2010	Hearing Scheduled (Motion 06/28/2010 04:00 PM) to Disallow Costs and Objection to Interest STATUS CHANGED: Closed pending clerk action	Robert J. Elgee Robert J. Elgee
6/17/2010	Notice Of Appeal Appealed To The Supreme Court STATUS CHANGED: Inactive Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Parsons, Smith & Stone, LLP Receipt number: 0003943 Dated: 6/17/2010 Amount: \$101.00 (Check) For: DL Evans Bank (defendant) Bond Posted - Cash (Receipt 3944 Dated 6/17/2010 for 100.00)	Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee Robert J. Elgee

Other Claims

Date		Judge
6/18/2010	Response Brief in Support of Request for Attorneys Fees and Costs and Prejudgment Interest	Robert J. Elgee
	Amended Notice of Appeal	Robert J. Elgee
6/28/2010	Continued (Motion 06/29/2010 03:00 PM) to Disallow Costs and Objection to Interest	Robert J. Elgee
6/29/2010	Court Minutes Hearing type: Motion Hearing date: 6/29/2010 Time: 3:35 pm Courtroom: District Courtroom-judicial Bldg Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: D219 Party: DL Evans Bank, Attorney: R.C. Stone Party: Leslie Benz, Attorney: Janet Wygle	Robert J. Elgee
	Hearing result for Motion held on 06/29/2010 03:00 PM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: to Disallow Costs and Objection to Interest less 100	Robert J. Elgee
7/7/2010	Order Suspending Appeal	Robert J. Elgee
7/12/2010	Motion for Attorneys Fees Notice of Hearing Thereon	Robert J. Elgee
	Hearing Scheduled (Motion for Attorney fees and Costs 08/02/2010 11:00 AM)	Robert J. Elgee
	Affidavit of Janet C. Wygle in Support of Motion for Attorney Fees	Robert J. Elgee
	Order on Application for Costs and on Objections to Attorney's Fees and Interest	Robert J. Elgee
	Amended Judgment	Robert J. Elgee
7/23/2010	Brief in Support of Motion for Attorneys Fees	Robert J. Elgee
7/26/2010	Memorandum in Opposition to IRCP 37 (c) Motion	Robert J. Elgee
	Affidavit of R. C. Stone in opposition to IRCP 37(c) Motion	Robert J. Elgee
8/2/2010	Court Minutes Hearing type: Motion for Attorney fees and Costs Hearing date: 8/2/2010 Time: 10:57 am Courtroom: Court reporter: Susan Israel Minutes Clerk: Crystal Rigby Tape Number: D224 Party: DL Evans Bank, Attorney: R.C. Stone Party: Leslie Benz, Attorney: Janet Wygle	Robert J. Elgee
	Miscellaneous Payment: For Making Copies Of Clerk's Record For Appeal Per Page Paid by: Parsons, Smith & Stone, LLP Receipt number: 0004993 Dated: 8/2/2010 Amount: \$562.50 (Check)	Robert J. Elgee
	Hearing result for Motion for Attorney fees and Costs held on 08/02/2010 11:00 AM: District Court Hearing Held Court Reporter: Susan Israel Estimated Number of Transcript Pages for this hearing: less 100	Robert J. Elgee

Date: 2/8/2011
Time: 09:32 AM
Page 9 of 9

h Judicial District Court - Blaine County
ROA Report
Case: CV-2009-0000613 Current Judge: Robert J. Elgee
Leslie Smith Benz vs. East Avenue Bluff, etal.

User: CRYSTAL

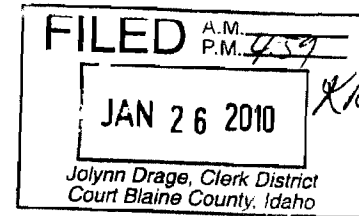
Other Claims

Date		Judge
8/2/2010	Case Taken Under Advisement	Robert J. Elgee
8/3/2010	Bond Converted (Transaction number 305 dated 8/3/2010 amount 100.00)	Robert J. Elgee
8/24/2010	Miscellaneous Payment: For Making Copies Of Clerk's Record For Appeal Per Page Paid by: Blaine County (converted bond) Receipt number: 0005514 Dated: 8/24/2010 Amount: \$100.00 (Check)	Robert J. Elgee
10/4/2010	Decision on Attorney Fees for Failure to Admit Pursuant to Rule 37(c)	Robert J. Elgee
	No longer UA	Robert J. Elgee
10/13/2010	Objection to Transcript Request for Additional Transcript, Objection to Record, Request for Deletions from Record, and Request for Additions to Record	Robert J. Elgee
	Notice Of Hearing on Objection to Transcript Request for Additional Transcript, Objection to Record, Request for Deletions from Record, and Request for Additions to Record	Robert J. Elgee
	Hearing Scheduled (Objection 10/25/2010 01:30 PM) Objection to Clerks Record / Transcript	Robert J. Elgee
10/15/2010	Stipulation for Order	Robert J. Elgee
10/25/2010	Hearing result for Objection held on 10/25/2010 01:30 PM: Hearing Vacated Objection to Clerks Record / Transcript	Robert J. Elgee
10/26/2010	Order	Robert J. Elgee
11/17/2010	Miscellaneous Payment: For Making Copies Of Clerks Record For Appeal Per Page Paid by: Parsons, Smith & Stone, LLP Receipt number: 0007499 Dated: 11/17/2010 Amount: \$263.75 (Check)	Robert J. Elgee
1/3/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Parsons Smith Stone Receipt number: 0000020 Dated: 1/3/2011 Amount: \$4.00 (Check)	Robert J. Elgee
1/10/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Sun Valley Title Receipt number: 0000193 Dated: 1/10/2011 Amount: \$9.00 (Check)	Robert J. Elgee
1/21/2011	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Sun valley Title Receipt number: 0000458 Dated: 1/21/2011 Amount: \$38.00 (Check)	Robert J. Elgee
2/8/2011	Second Amended Judgment	Robert J. Elgee
	STATUS CHANGED: Closed	Robert J. Elgee

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB# 2232

Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company, D.L. EVANS BANK;
et al.

Defendants.

Case No. CV-2009-613

STIPULATION REGARDING
 TRUSTEE'S SALE

COME NOW THE PLAINTIFF, Leslie Benz ("Benz") by and through her attorney of record, Janet C. Wygle of Luboviski, Wygle, Fallowfield & Ritzau, P.A., and the Defendant, D. L. Evans Bank ("D.L. Evans), by and through its attorney of record, R.C. Stone, of Parsons, Smith & Stone, LLP, and stipulate to the Court's entry of an order providing as follows:

1. The sale of Lot 3, Block 41, City of Ketchum, Blaine County, Idaho (hereinafter "the Property") scheduled for 1/27/10 will proceed on that date.
2. If the Blaine County District Court in Case No. CV-2009-613 adjudicates that Benz's Vendee's Lien has, or at the time of the Trustee's Sale had, priority over the lien of D.L. Evans, and such decision is not appealed or is upheld on appeal, then at Benz's request

STIPULATION/1

D.L. Evans will pay to Benz the full amount determined to be owing and having priority over D.L. Evans, whether or not D.L. Evans owns the Property at such time. However, if a third party purchases the Property at the Trustee's Sale, Benz's lien on and right to foreclose upon the Property against such third party in lieu of such payment is not affected by this Stipulation.

3. If D.L. Evans acquires the Property, then pending the final adjudication of Benz's claims,

D.L. Evans shall:

- a. Insure the Property to its full, insurable value; and
 - b. Maintain the Property and its improvements, including appliances and landscaping, in "like new" condition; and
 - c. Provide access to Benz for inspecting the premises upon reasonable advance notice.
4. If the Court adjudicates Benz has a Vendee's Lien which is junior, in whole or in part, to the lien of D.L. Evans, as it existed on the date of sale, then, to the extent that the Court determines that Benz has a right of redemption or other right in the Property as of that date, Benz's right(s) shall survive the sale should D.L. Evans successfully bid and acquire the property, or shall continue in the proceeds from the sale in the event a third party bids and acquires the property.
5. This stipulation is limited to the matters expressly set forth. If either party has a claim against the other not specifically identified herein such claim is not compromised, settled, or affected hereby, including claims to attorney's fees and/or costs.
6. This stipulation shall not compromise or limit the right of appeal of either party provided that the term "Court," as used above, shall be deemed to include the decision of the trial court and of any appellate court.

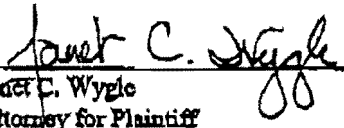
JAN/26/2010/TUE 05:11 PM L.W.F. & R. P.A.
JAN-26-2010 TUE 04:54 PM PARSON SMITH & STONE
JAN/26/2010/TUE 04:38 PM L.W.F. & R. P.A.

FAX No. 208-726-3750
FAX NO.
FAX No. 208-726-3750

P. 004
P. 02
P. 002

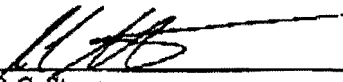
DATED this 26th day of January, 2010.

LUBOVISKI, WYGLE, FALLOWFIELD & RITZAU, P.A.


Janet C. Wygle
Attorney for Plaintiff

DATED this 26th day of January, 2010

PARSONS, SMITH & STONE, LLP

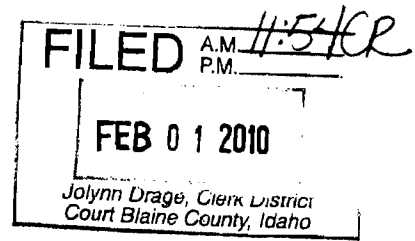

R.C. Stone
Attorney for Defendant D. L. Evans Bank

STIPULATION/3

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB# 2232

Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,)	
	)	Case No. CV-2009-613
Plaintiff,)	
)	
v.)	
	)	ORDER REGARDING
EAST AVENUE BLUFF, LLC, an Idaho limited	)	TRUSTEE'S SALE
liability company; D.L. EVANS BANK;)	
<i>et al.</i>)	
)	
Defendants.)	

BASED upon the Stipulation of counsel for the Plaintiff and for the Defendant, D.L.
Evans Bank, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. The sale of Lot 3, Block 41, City of Ketchum, Blaine County, Idaho (hereinafter "the Property") scheduled for 1/27/10 will proceed on that date.
2. If the Blaine County District Court in Case No. CV-2009-613 adjudicates that Benz's Vendee's Lien has, or at the time of the Trustee's Sale had, priority over the lien of D.L. Evans, and such decision is not appealed or is upheld on appeal, then at Benz's request D.L. Evans will pay to Benz the full amount determined to be owing and having priority

over D.L. Evans, whether or not D.L. Evans owns the Property at such time. However, if a third party purchases the Property at the Trustee's Sale, Benz's lien on and right to foreclose upon the Property against such third party in lieu of such payment is not affected by this Stipulation.

3. If D.L. Evans acquires the Property, then pending the final adjudication of Benz's claims,

D.L. Evans shall:


- a. Insure the Property to its full, insurable value; and
- b. Maintain the Property and its improvements, including appliances and landscaping, in "like new" condition; and
- c. Provide access to Benz for inspecting the premises upon reasonable advance notice.

4. If the Court adjudicates Benz has a Vendee's Lien which is junior, in whole or in part, to the lien of D.L. Evans, as it existed on the date of sale, then, to the extent that the Court determines that Benz has a right of redemption or other right in the Property as of that date, Benz's right(s) shall survive the sale should D.L. Evans successfully bid and acquire the property, or shall continue in the proceeds from the sale in the event a third party bids and acquires the property.

5. This stipulation is limited to the matters expressly set forth. If either party has a claim against the other not specifically identified herein such claim is not compromised, settled, or affected hereby, including claims to attorney's fees and/or costs.

6. This stipulation shall not compromise or limit the right of appeal of either party provided that the term "Court," as used above, shall be deemed to include the decision of the trial court and of any appellate court.

DATED this 27 day of January, 2010.



Robert J. Elgee
District Judge 09-613

CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of ^{Feb.} ~~January~~, 2010, I served a true and correct copy of the within and foregoing document upon the attorneys named below in the manner noted:


Janet C. Wygle
LUBOVISKI, WYGLE, FALLOWFIELD & RITZAU, P.A.
P.O. Box 1172
Ketchum, Idaho 83340

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318

X By depositing copies of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.

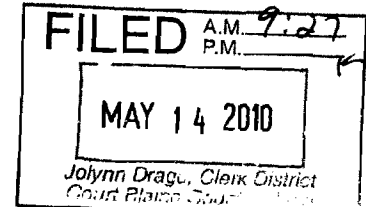
___ By hand delivering copies of the same to the offices of the attorney.

___ By transmitting copies of the same to said attorney by facsimile machine process.



Clerk of the District Court

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
 Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB# 2232
 Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,
 Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company; D.L. EVANS BANK;
 TIMELESS DESIGN COMPANY; CLIFF R.
 IVERSON dba LEI'S CUSTOM TILE; FISHER
 APPLIANCE, INC.; VIEWPOINT, INC.; CAD
 DRAFTING SYSTEMS, INC.; BUCKHORN
 ELECTRIC, LLC/DEVILAN HAIRE; A.C.
 HOUSTON LUMBER COMPANY; MIKE
 PUNNETT; PRECISION PLUMBING, INC.;
 WATSON BUILDERS, INC.; HARRIS
 REFRIGERATION HEATING AND ELECTRIC;
 FERGUSON ENTERPRISES, INC.; ROCKY
 MOUNTAIN HARDWARE, INC.; SWEET'S
 PORTABLE WASTE SERVICES, LLC; WHITE
 BUILDERS, LLC; MIKE'S WELDING AND
 METAL WORKS, LLC; SENTINEL FIRE &
 SECURITY, INC.; STEVE McCOY, dba
 McCOY'S PAINTING; CHRISTOPHER
 BRENNAN dba BRENNAN'S CARPET; and
 PAUL COOPER dba SUN VALLEY DRYWALL,

Defendants.

Case No. CV-2009-613

AFFIDAVIT OF JANET WYGLE'S
 INTEREST CALCULATIONS
 FOR ORDER OF
 SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Blaine)

JANET C. WYGLE, being first duly sworn, upon oath, deposes and says:

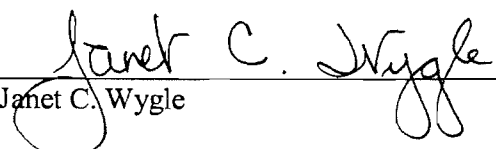
1. I am the attorney for the Plaintiff herein and make this Affidavit based on my own personal knowledge and in support of an award of interest to the Plaintiff in the Order of Summary Judgment against D.L. Evans Bank.

2. I started with the pre-judgment rate for interest on money due pursuant to Idaho Code §28-22-104(1), which is twelve percent (12%) per annum.

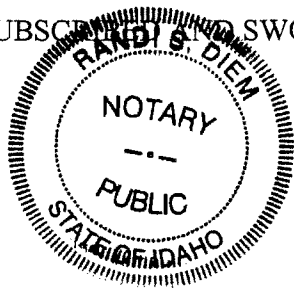
3. I multiplied the Plaintiff's Vendee's Lien amount of \$750,000.00 by 12%, which resulted in an interest amount of \$90,000.00 per annum. I then divided that amount by 365 days, which resulted in a daily interest amount of \$246.58.

4. Pursuant to Idaho law that interest on a liquidated or ascertainable amount commences on the date of breach of the contract, I determined that interest on the Plaintiff's claim commenced to accrue on the date the real estate purchase and sale contract was breached by East Avenue Bluff, LLC, the vendor. The breach occurred on February 6, 2009, the final closing date for the purchase and sale transaction between the Plaintiff and East Avenue Bluff, LLC (see Addendum #3 to the Real Estate Purchase and Sale Agreement attached to Leslie Benz's deposition as Exhibit 14, a true and correct copy of which is attached hereto as Exhibit "A").

5. Between February 6, 2009, and May 3, 2010, there are 451 days. Multiplying the daily interest amount of \$246.58 by 451 days results in pre-judgment interest of \$111,207.58.


Janet C. Wygle

SUBSCRIBED AND SWORN to before me this 13th day of May, 2010.



Randy S. Dein
Notary Public for Idaho
Residing at: Hailey, ID
Commission Expires: 11-2-11

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May, 2010, I served a true and correct copy of the within and foregoing document upon the following attorney, in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

- ☐ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Ketchum, Idaho.
- ☐ By hand delivering copies of the same.
- ☒ By transmitting copies of the same to said attorneys by facsimile machine process.

Janet C. Wygle
Janet C. Wygle

Addendum # 3

Date of Addendum: 12/15/2008



This is an ADDENDUM to the Real Estate Purchase and Sale Agreement, identified as:
Document # SVB-SR-07-04

Date of Document: 06/03/2007

Page 1 of 1

Property Address: 100 East Avenue

Buyer(s): Leslie Benz and/or Assigns

Seller(s): Rutherford and/or Assigned to the development LLC "East Avenue Bluff, LLC"

The undersigned Parties hereby agree as follows:

1. Buyer and Seller agree Closing Date to be February 6, 2009.



This ADDENDUM, upon its execution by both parties, is made an integral part of the aforementioned Agreement. In the event of any conflict or inconsistency between the provisions of this Addendum and the aforementioned Agreement, the provisions of this Addendum shall control in all respects.

Buyer's Signature

x [Signature] 12-15-08
Signature Date

Buyer's Signature

x _____
Signature Date

Seller's Signature

x [Signature] 12-15-08
Signature Date

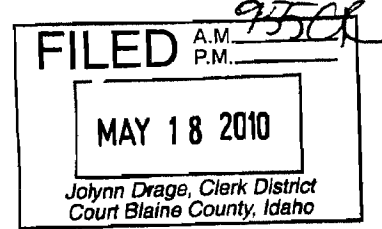
Seller's Signature

x _____
Signature Date

EXHIBIT

19

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
 Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB# 2232
 Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,
 Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company; D.L. EVANS BANK;
 TIMELESS DESIGN COMPANY; CLIFF R.
 IVERSON dba LEI'S CUSTOM TILE; FISHER
 APPLIANCE, INC.; VIEWPOINT, INC.; CAD
 DRAFTING SYSTEMS, INC.; BUCKHORN
 ELECTRIC, LLC/DEVILAN HAIRE; A.C.
 HOUSTON LUMBER COMPANY; MIKE
 PUNNETT; PRECISION PLUMBING, INC.;
 WATSON BUILDERS, INC.; HARRIS
 REFRIGERATION HEATING AND ELECTRIC;
 FERGUSON ENTERPRISES, INC.; ROCKY
 MOUNTAIN HARDWARE, INC.; SWEET'S
 PORTABLE WASTE SERVICES, LLC; WHITE
 BUILDERS, LLC; MIKE'S WELDING AND
 METAL WORKS, LLC; SENTINEL FIRE &
 SECURITY, INC.; STEVE McCOY, dba
 McCOY'S PAINTING; CHRISTOPHER
 BRENNAN dba BRENNAN'S CARPET; and
 PAUL COOPER dba SUN VALLEY DRYWALL,
 Defendants.

Case No. CV-2009-613

MEMORANDUM OF COSTS
 AND
 AFFIDAVIT OF
 ATTORNEY'S FEES & COSTS

STATE OF IDAHO)
) ss.
County of Blaine)

I, Janet C. Wygle, being first duly sworn on oath, depose and state as follows:

1. I am the attorney of record for the Plaintiff, Leslie Benz, and I make this affidavit based upon my own personal knowledge and belief and am fully competent to testify to the facts stated herein. This affidavit is made in support of an award of attorney's fees and costs against Defendant D.L. Evans Bank (hereinafter "the Bank").

2. I charged my client \$300.00 per hour for the services I performed for her and I believe such hourly rate to be reasonable and similar to the hourly rates charged by other attorneys with similar experience for similar work in Blaine County, Idaho. I have practiced in the area of general litigation since 1976. Attorneys in the Blaine County, Idaho area with at least 30 years of litigation experience (e.g., Edward Lawson, Terry Hogue, Bruce Collier, Doug Aanestad) charge between \$250 and \$350 per hour for such litigation. I bill in minimum increments of 1/10 of an hour. I also charged my client \$75.00 per hour for my paralegal's services related to discovery, billed in the same increments as I bill.

3. In the following time and expense calculations, I have included the following services provided to my client which were related to the Defendant, the Bank: meetings with my client, drafting the Complaint and Summons, preparing and recording the *lis pendens*, service upon Defendant the Bank, communications between myself, Lance Loveland and Joe Meier regarding the Banks's deed of trust lien and related matters, ordering and reviewing the litigation guarantee, preparing responses to the Bank's discovery requests, preparing discovery requests directed to the Bank, attending the deposition of my client which was taken by the Bank, preparing for and taking the deposition of the Bank's agent, Bruce Hunsaker, reviewing over 2,000 pages of documents

produced by the Bank, participating in conferences with my paralegal regarding indexing and reviewing documents produced by the Bank, preparing a Motion and Affidavit to Compel discovery responses, preparing a Trial Setting Request, preparing a Motion, Affidavit and Memorandum of Law for a Stay of the Bank's foreclosure proceeding, researching legal issues related to such Motion, attending and arguing at the hearing on the Motion for Stay, researching availability of bonding for the Stay of Trustee's Sale, negotiating and drafting the Stipulation re: Trustee's Sale, participating in numerous phone calls between myself and the Bank's attorneys and law office staff, reviewing additional discovery responses from the Bank, having additional conferences with my paralegal regarding additional discovery, attending the scheduling conference with the Judge and opposing counsel, reviewing the Bank's Motion to Vacate Trial Date, reviewing Stipulation and proposed Order to Vacate Trial Date, researching issues related to Vendee's Lien and summary judgment, preparing a Motion for Summary Judgment, reviewing deposition transcripts and preparing an Affidavit in Support of Summary Judgment, preparing a Brief in Support of Summary Judgment, reading the Bank's Response Brief, researching additional case law, preparing Plaintiff's Reply Brief for Summary Judgment, preparing for and arguing at the Summary Judgment hearing, preparing the Order on Summary Judgment, preparing an Affidavit of Calculations of Interest, and engaging in numerous other related matters. I also utilized the services of my paralegal for services relating to preliminary review, indexing and copying of documents produced in discovery by the Bank, which documents exceeded 2,000 pages, although there were many duplications found.

4. I have excluded all services rendered to my client with regard to the other named Defendants, including, preparing the Summonses, obtaining service of the Complaint and Summons on the other Defendants, preparing consents to default, reading Notices of Appearances,

reading and replying to letters from opposing counsel, participating in phone calls with other opposing counsel, preparing and serving Notices of Intent to Take Default, preparing Applications for Default, preparing Defaults and Default Judgments, etc. All Defendants *other* than the Bank were defaulted out of the lawsuit and there were no motions, discovery requests, or unique issues. The total time I spent on these activities involving Defendants *other* than the Bank was 33.5 hours.

5. I spent at least 114.3 hours performing the services set forth in paragraph 3, above, to the Plaintiff regarding the Bank. Multiplying **114.3 hours** by the rate of **\$300 per hour** results in attorney's fees of **\$34,290.00**. My paralegal spent 9.2 hours performing the services set forth in paragraph 3, above, regarding the Bank. Multiplying **9.2 hours** by the rate of **\$75.00 per hour** results in paralegal fees of **\$690.00**. Adding the attorneys fees and paralegal fees allowed under I.R.C.P. Rule 54(e)(1) results in total fees recoverable in the sum of **\$34,980.00**. If the Plaintiff's request for attorney's fees is contested, the amount incurred to defend such request should be added to this amount in order to make the Defendant whole.

6. The costs and expenses which the Plaintiff incurred and which are recoverable as a matter of right to the prevailing party pursuant to Rule 54(d)(1)(C) are as follows:

Court filing fees	\$ 88.00
Benz deposition copy	\$ 207.05
Hunsaker deposition & copy	<u>\$ 780.00</u>
Total costs of right	\$1,075.05

7. The costs and expenses which the Plaintiff incurred and which are recoverable as discretionary costs to the prevailing party pursuant to Rule 54(d)(1)(D) are as follows:

Litigation Guarantee to determine lienors' dates, names and addresses (1/14)	\$ 174.07
Mileage costs for hearings (4) and depositions	\$ 171.80
Copies (451 x \$.15)	\$ 67.65
Facsimiles (275.6 x \$.75)	<u>\$ 206.70</u>
Total discretionary costs	\$ 620.22

These costs were necessarily incurred because in order to foreclose her Vendee's Lien, Plaintiff was required to notify all junior lienholders, of which there were 14, including D.L.Evans Bank, and a litigation guarantee is the normal and ordinary method of determining all matters of record on the subject property. The largest portion of the mileage charge is for the drive from Hailey, Idaho, to Burley, Idaho, to take Mr. Hunsaker's deposition in the county where he resided according to the Idaho Rules of Civil Procedure; the rest are for mileage to and from court hearings or conferences. The copies and facsimiles were incurred in responding to discovery promulgated by the Bank, making service copies of documents, making exhibits for affidavits, filing documents with the court, etc.

8. CONSIDERATIONS UNDER I.R.C.P. , Rule 54(e)(3)

A. This was a novel case involving a Vendee's Lien under Idaho Code §45-804, its proof, validity and priority over other liens. This is a rarely used, and virtually unknown, Idaho statute. There is very little Idaho case law in this area, and very little case law in the western regions regarding a Vendee's Lien. I did both computer research and index research, totaling in excess of 31 hours. I did substantial amounts of research on the issue of the vendee's lien accrual date, relationship back of later-paid amounts, elements of the claim and similar equitable claims. I also researched staying a foreclosure proceeding when the priority of the party seeking such stay is unknown, but could be prejudiced. I researched recovery of interest on the Vendee's Lien, and the recovery of attorney's fees in a Vendee's Lien case. All of these were novel issues with very little case law available. Admittedly, some of the research did not result in a useful case, but all of it was educational, and led to the arguments and legal support which the Court found persuasive. Bank's affirmative defenses of waiver, laches & unclean hands with regard to Vendee's Lien were

also researched, which took several hours. The discovery and depositions and the Motion to Compel were not legally difficult, but there were thousands of pages of documents to be dealt with in order to find the ones that related to the Plaintiff's claim. Much of the deposition of the Plaintiff dealt with her conduct in an attempt to find factual support for the Bank's affirmative defenses. Much of Mr. Hunsaker's deposition dealt with loan procedures of the Bank and the knowledge of the Senior Loan Committee at the time it approved the loan and later when it refused to go through with the closing of the sale to Ms. Benz. There was over 4 hours of time consumed in driving to and from Mr. Hunsaker's deposition in Burley, where it was required to be held. There were three (3) contested hearings with affidavits and memorandum and briefs and orders to be drafted. The case was time-consuming and complicated. I could have spent dozens of hours more in researching, drafting and organizing; I could not have spent even 1 hour less than I did to achieve the result.

B. See discussion in sub-paragraph A, above.

C. Counsel for Plaintiff has been a licensed attorney since 1976, and has represented contractors, sub-contractors and homeowners in lien disputes for over 30 years; however, this was a totally different type of lien. Counsel for Plaintiff has been involved in at least 6 trials in construction disputes and many more litigation cases which were resolved without trial. Counsel for Plaintiff has a good track record of successful resolutions of construction dispute cases, both with and without trials. This case required familiarity with several areas of the law, an ability to extrapolate from existing case law, and an ability to argue for extensions of existing case law. This case was novel and more of a legal challenge than any standard mechanic's lien lawsuit.

D. Attorneys in the Blaine County, Idaho area with at least 30 years of litigation experience (e.g., Edward Lawson, Bruce Collier, Doug Aanestad) currently charge between \$250-\$375 per

hour. I have similar experience and my hourly rate is similar to their hourly rates.

E. Pursuant to a written contract for legal services, I charged the Plaintiff a fixed hourly fee of \$300.00 plus costs.

F. The Bank commenced a foreclosure action on its mortgage on the subject property shortly after this case was commenced, which complicated the matter and required an intermediate Motion for Stay. The property was deteriorating and required somebody to take charge of it to maintain its value, which was accomplished by Stipulation after the Court granted the Plaintiff's Motion for Stay and set a very large bond amount. The case was resolved on Summary Judgment 6 weeks before trial.

G. The Plaintiff's claim was for \$750,000.00, plus interest and attorney's fees. The Bank's claim was for \$2.6 million. The property was originally worth over \$3 million, but is now worth less than \$2 million, so there were substantial amounts of money at risk. The Plaintiff prevailed fully upon her claim in that the full amount of the Plaintiff's Vendee's Lien, plus interest, was declared superior to the Bank's deed of trust in the Summary Judgment order. Previously, the Plaintiff had prevailed on her contested Motion to Stay the Bank's Trustee's Sale of the property, and was granted such stay subject to posting a bond. The parties thereafter stipulated to the entry of the Order Regarding Trustee's Sale, which was entered February 2, 2010. Except for the Plaintiff's Motion to Compel Answers to Interrogatories, filed in November, 2010, there were no procedural disputes and counsel for the parties were cooperative with each other. The Bank's affirmative defenses were denied and the Plaintiff was awarded the full amount of her claim, with priority over the Bank. The Plaintiff is clearly the prevailing party.

H. A case like this will be rare because very few buyers would release non-refundable purchase money to the vendor and have the peculiar facts of this case. Plus, this case and the

Court's decision has educated many attorneys and several banks to the rare incidence of a Vendee's Lien and advanced the body of law in this area.

I. The Plaintiff is a client of Terry Hogue, who referred her to me for this litigation when he had a conflict.

J. I am unaware of any similar cases during my 32 years of law practice.

K. Although Computer Assisted Legal Research was used in this case, the Plaintiff was not charged for it because my law firm maintains a monthly subscription.

L. The Court should consider that the Plaintiff prevailed 100% in obtaining a Stay of the Trustee's Sale and in obtaining the Summary Judgment award and successfully defended against the Bank's affirmative defenses. Also, the Court should consider that the Bank had been in a position to avoid this lawsuit by allowing the Plaintiff to complete her purchase of the subject property in 2009.

6. A. Attorney's fees should be awarded to my client under Idaho Code §12-120(3) and Idaho Rules of Civil Procedure, Rule 54(e)(1) as prevailing party in a commercial transaction or as prevailing party on D.L. Evans Bank's action on a note.

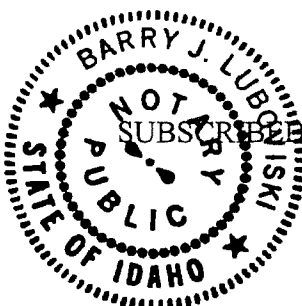
B. In the alternative, attorney's fees of \$5,790.00 should be awarded pursuant to Idaho Code §12-121, and Idaho Rules of Civil Procedure, Rule 54(e)(1), on the grounds that the Bank's affirmative defenses were frivolous, unreasonable and without foundation. As shown in Exhibit "A", attached hereto, the affirmative defenses were pursued by the Bank through discovery and Ms. Benz's and Mr. Hunsaker's depositions, although the Bank never presented any facts to support such affirmative defenses. The preparation of Interrogatories regarding the defenses, the review of the Bank's Answers to such Interrogatories, the portions of the two depositions which dealt with the defenses, and the research and portion of the Summary Judgment Brief dealing with

such defenses took up significant amounts of time (approximately 19.3 hours) and cost Ms. Benz approximately \$5,790.00 to defend against, which defense prevailed.

C. In addition to sub-paragraph B, above, and in the alternative to sub-paragraph A, above, attorney's fees for 49.9 hours of legal work, in the sum of \$14,970.00 should be awarded pursuant to Idaho Rules of Civil Procedure, Rule 37(c), on the grounds that the Bank denied Plaintiff's Request for Admission No. 2 which requested: "Admit that D.L. Evans Bank knew, or should have known, the terms of the purchase and sale contract between East Avenue Bluff, LLC and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff LLC. " The Bank provided a copy of that purchase and sale contract to Plaintiff as part of its discovery and the terms of the contract were recited in part in the Loan Memorandum. These facts are supported by Exhibit "G" to the Affidavit of Janet C. Wygle in support of Motion for Summary Judgment, filed April 5, 2010. This denial was not revised after either Ms. Benz's or Mr. Hunsaker's depositions and remained "at issue" as of the Summary Judgment argument. The Plaintiff proved, as part of her Summary Judgment motion, that the Bank had had a copy of, and known the terms of, such purchase and sale contract from July, 2007, prior to the loan being granted.

7. To the best of my knowledge and belief the items of costs included herein are correct and the costs claimed are in compliance with I.R.C.P., Rule 54(d)(5).

8. The documents attached hereto as Exhibit "A" are true and correct copies of the Defendant Bank's responses to discovery which relate to paragraphs 6.B. and 6.C., above.



Janet C. Wygle
Janet C. Wygle

SUBSCRIBED AND SWORN to before me this 17th day of May, 2010.

Barry J. Lubowski
Notary Public for Idaho
My commission expires: 11-7-2013

CERTIFICATE OF SERVICE

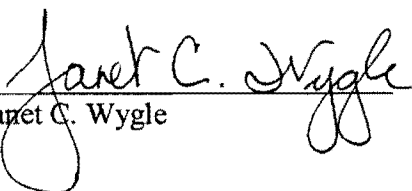
I HEREBY CERTIFY that on the 17th day of May, 2010, I served a true and correct copy of the within and foregoing document upon the following attorney, in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

_____ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Ketchum, Idaho.

_____ By hand delivering copies of the same.

☒ By transmitting copies of the same to said attorneys by facsimile machine process.


Janet C. Wygle

1 WELDING AND METAL WORKS, LLC;)
2 SENTINEL FIRE & SECURITY, INC.;)
3 STEVE McCOY, d.b.a. McCOY'S)
4 PAINTING; CHRISTOPHER BRENNAN)
5 d.b.a. BRENNAN'S CARPET; and)
6 PAUL COOPER d.b.a. SUN VALLEY)
7 DRYWALL,)
8 Defendants.)

9 COMES NOW the Defendant, D.L. EVANS BANK, who responds to the request for
10 admissions of Plaintiff as follows:

11 REQUESTS FOR ADMISSION

12 REQUEST FOR ADMISSION NO. 1: Admit that D.L. Evans Bank required a
13 contract for the pre-sale of the first townhouse to be built by East Avenue Bluff LLC as a
14 condition of approving your loan to East Avenue Bluff LLC.

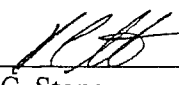
15 RESPONSE TO REQUEST FOR ADMISSION NO. 1: Deny.

16 REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or should
17 have known, the terms of the purchase and sale contract between East Avenue Bluff LLC and
18 Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to
19 East Avenue Bluff LLC.

20 RESPONSE TO REQUEST FOR ADMISSION NO. 2: Deny.

21 DATED this 10 day of September, 2009.

22 PARSONS, SMITH & STONE, LLP

23
24 
25 R. C. Stone
26 Attorneys for Plaintiff

D.L. EVANS BANK'S RESPONSE TO REQUEST FOR ADMISSIONS - 2

EXHIBIT

A

to Memo of Costs
& Attorney's fees

1 * INTERROGATORY NO. 3: Please state each and every fact, belief or opinion upon
2 which you base your First Affirmative Defense that the Plaintiff is guilty of laches, and for
3 each such fact provide the relevant date(s) and participating individuals.

4 * ANSWER TO INTERROGATORY NO. 3: Plaintiff did not timely assert a vendee's
5 lien by reason of which D.L. Evans Bank, acting through the senior loan committee and loan
6 officer Ken Nelson and Jim Kino, continued to make disbursements on this construction loan
7 over the entire construction of the project, totaling in excess of \$2.5 million. By reason of
8 plaintiff's late assertion of the claimed right to a vendee's lien, D.L. Evans Bank will incur a
9 substantial loss on this loan entered into, and disbursed, in reliance on the plaintiff's
10 obligation.
11

12 * INTERROGATORY NO. 4: Please state each and every fact, belief or opinion upon
13 which you base your Second Affirmative Defense that the Plaintiff has unclean hands, and for
14 each such fact provide the relevant date(s) and participating individuals.

15 * ANSWER TO INTERROGATORY NO. 4: The allegation of the Second Affirmative
16 Defense is related to the First Affirmative Defense. By allowing D.L. Evans Bank to continue
17 to make disbursements on this loan, while knowing actually or constructively that the Bank
18 was relying on the plaintiff's agreement to purchase the property and thereafter refusing to
19 complete the purchase, knowing D.L. Evans Bank would suffer a substantial loss as a result,
20 an inequitable behavior amounting to dirty hands.
21
22
23
24
25
26

1 ~~*~~ INTERROGATORY NO. 5: please state each and every fact, belief or opinion upon
2 which you base your Third Affirmative Defense that the Plaintiff waiver her priority, and for
3 each such fact provide the relevant date(s) and participating individuals.

4 ~~*~~ ANSWER TO INTERROGATORY NO. 5: The allegations to Interrogatory No. 3
5 and Interrogatory No. 4 relating to first and second affirmative defenses also set forth the third
6 affirmative defense in that the Plaintiff's conduct or actions lead D.L. Evans Bank to
7 reasonably conclude that D.L. Evans Bank was perfected in a first place position in making
8 the loan disbursements.
9

10 INTERROGATORY NO. 6: If your response to Request for Admission No. 1 is not a
11 complete and unqualified admission, please state each and every fact, belief or opinion upon
12 which you base your response, and for each such fact provide the relevant date(s) and
13 participating individuals.
14

15 ANSWER TO INTERROGATORY NO. 6: Based upon the current state of D.L.
16 Evans Bank's document review and the recollections of the Senior Loan Committee members,
17 it does not appear a contract for pre-sale of the first townhouse to be built by East Avenue
18 Bluff, LLC as a condition of approving its loan to East Avenue Bluff, LLC. D.L. Evans'
19 review is ongoing and responses will be supplemented, if appropriate.
20

21 ~~*~~ INTERROGATORY NO. 7: If your response to Request for Admission No. 2 is not a
22 complete and unqualified admission, please state each and every fact, belief or opinion upon
23 which you base your response, and for each such fact provide the relevant date(s) and
24 participating individuals.
25

26 D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 6

1 ~~*~~ ANSWER TO INTERROGATORY NO. 7: Based upon D.L. Evans Bank's current
2 document review, there is no basis for admitting that D.L. Evans Bank knew or should have
3 known the terms of the Purchase and Sale Contract between East Avenue Bluff, LLC and
4 Leslie Benz, including the payment release provisions and dates prior to closing on its loan to
5 East Avenue Bluff, LLC. The senior loan committee was advised of the fact that a sale
6 existed and some of its terms, but the contract itself was not presented to the senior loan
7 committee and the Bank's documentation, to this point of the review, has not established that
8 the contract itself was received by the Bank prior to the closing of the loan. In this regard, the
9 loan officers in the loan are no longer employed by D.L. Evans Bank and D.L. Evans Bank
10 has been attempting, without success, to obtain information from them relating to this
11 transaction.
12

13
14 ~~INTERROGATORY NO. 8: WITNESSES: Please identify, pursuant to paragraph~~
15 ~~A.4., above, each person having knowledge of the facts of this case. Also, for each of those~~
16 ~~identified persons whom you expect to call as a witness at the trial, state the substance of his~~
17 ~~or her expected testimony.~~

18
19 ~~ANSWER TO INTERROGATORY NO. 8: The senior loan committee, comprised of~~
20 ~~Bruce Hunsaker, Scott Horsley, John Evans, Jr., John Evans, Sr., George Gorton, J.V. Evans,~~
21 ~~Jim Lynch, Glen Kuneau, Don Evans and Kevin Smith can be located at PO Box 1188,~~
22 ~~Burley, Idaho 83318. Jim Kino and Ken Nelson still reside in Blaine County, believed to be~~
23 ~~in the Hailey area, an address will be provided when it can be located. The above, as well as~~
24 ~~the plaintiff, and the other named defendants, are persons having knowledge of the facts of~~

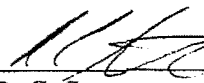
25
26 D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 7

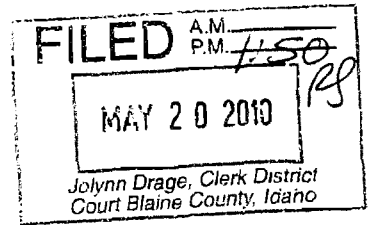
1 and for each such expert witness state the subject matter and the substance of the facts and
2 opinions to which he/she is expected to testify.

3 ANSWER TO INTERROGATORY NO. 10: The persons identified above have
4 expert qualifications in banking and loan practices. None have been retained as an expert in
5 this case and, at this time, none has been asked to formulate any opinions relative to this
6 litigation. If, at any time, it appears that they will be asked to testify as an expert, the
7 response to this interrogatory will be supplemented.
8

9 DATED this 18 day of November, 2009.

10 PARSONS, SMITH & STONE, LLP

11
12 
13 R. C. Stone
14 Attorneys for Defendant D.L. Evans Bank
15
16
17
18
19
20
21
22
23
24
25
26



1 R.C. Stone
2 **PARSONS, SMITH, STONE,**
3 **LOVELAND & SHIRLEY, LLP**
4 137 West 13th Street
5 P.O. Box 910
6 Burley, Idaho 83318
7 (208) 878-8382 - Phone
8 (208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

9 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
10 STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

12 LESLIE BENZ,)
13)
14 Plaintiff,)

Case No. CV-2009-613

15 vs.)

OBJECTION TO PLAINTIFF'S
ORDER OF SUMMARY JUDGMENT

16 EAST AVENUE BLUFF, LLC, an Idaho)
17 limited liability company; D.L. EVANS)
18 BANK; TIMELESS DESIGN COMPANY;)
19 CLIFF R. IVERSON d.b.a. LEI'S)
CUSTOM TILE; FISHER APPLIANCE,)
20 INC.; VIEWPOINT, INC.; CAD)
DRAFTING SYSTEMS, INC.;)
BUCKHORN ELECTRIC, LLC/DEVILAN)
21 HAIRE; A.C. HOUSTON LUMBER)
COMPANY; MIKE PUNNETT;)
22 PRECISION PLUMBING, INC.;)
WATSON BUILDERS, INC.; HARRIS)
23 REFRIGERATION HEATING AND)
ELECTRIC; FERGUSON ENTERPRISES,)
24 INC.; ROCKY MOUNTAIN)
25 HARDWARE, INC.; SWEET'S)

26 OBJECTION TO PLAINTIFF'S
ORDER OF SUMMARY JUDGMENT - 1

PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP
LAWYERS
BURLEY, IDAHO

1 PORTABLE WASTE SERVICES, LLC;)
2 WHITE BUILDERS, LLC; MIKE'S)
3 WELDING AND METAL WORKS, LLC;)
4 SENTINEL FIRE & SECURITY, INC.;)
5 STEVE McCOY, d.b.a. McCOY'S)
6 PAINTING; CHRISTOPHER BRENNAN)
7 d.b.a. BRENNAN'S CARPET; and)
8 PAUL COOPER d.b.a. SUN VALLEY)
9 DRYWALL,)
10 Defendants.)

11 COMES NOW the Defendant, D.L. Evans Bank, who hereby objects to the Plaintiff's
12 Order of Summary judgment as follows:

- 13 1. It is not consistent with the Court's oral ruling.
- 14 2. It states the Bank was not present is incorrect. The hearing was attended by Bruce
15 Hunsaker.
- 16 3. There is no evidence in the record to support the statement that the bank had actual
17 notice of "\$500,000 in purchase payments made by Plaintiff to vendor prior to making its loan
18 to such vendor".
- 19 4. There is no evidence in the record to support the statement that the \$250,000
20 payment was "relied upon by the bank."
- 21 5. The recital of findings and conclusions is not sufficient to support an entry or an
22 order of summary judgment.
- 23 6. Prejudgment interest was computed from an alleged default date as opposed to the
24 rescission date, which is the earliest date from which prejudgment interest could accrue.

25
26 OBJECTION TO PLAINTIFF'S
ORDER OF SUMMARY JUDGMENT - 2

1 Rescission is a condition of the right of recovery under *McMahon v. Cooper*, 70 Idaho 39, 212
2 P.2d 657 (1949) which states in part:

3 Appellant was not in default at the time the notice of completion was given.
4 He was entitled, upon the breach of the contract by respondents, Cooper, to
5 rescind the contract and to recover the money paid thereon.

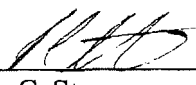
6 Id. at 70 Idaho 147, 212 P.2d 661.

7
8 7. The Order fails to cite or establish a rescission date based upon the record
9 currently before the Court.

10 8. The proposed "Order of Summary Judgment" is inconsistent with Idaho
11 law and the factual record before the Court as previously briefed and argued.

12 DATED this 10 day of May, 2010.

13
14 PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP

15 
16 R. C. Stone
17 Attorneys for Plaintiff
18
19
20
21
22
23
24
25

26 OBJECTION TO PLAINTIFF'S
ORDER OF SUMMARY JUDGMENT - 3

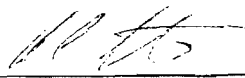
CERTIFICATE OF DELIVERY

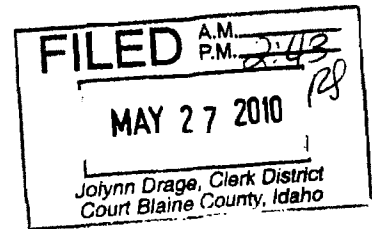
I hereby certify that on the 12 day of May, 2010, I served a copy of the foregoing
OBJECTION TO PLAINTIFF'S ORDER OF SUMMARY JUDGMENT upon the following
named person(s) in the manner listed below:

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

**PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP**


R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318



PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP
LAWYERS
BURLEY, IDAHO

R.C. Stone
**PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP**
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318
(208) 878-8382 - Phone
(208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,
Plaintiff,

vs.

Case No. CV-2009-613

MOTION TO DISALLOW COSTS

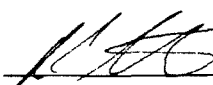
EAST AVENUE BLUFF, LLC, an Idaho
limited liability company; D.L. EVANS
BANK; TIMELESS DESIGN COMPANY;
CLIFF R. IVERSON d.b.a. LEI'S
CUSTOM TILE; FISHER APPLIANCE,
INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.;
BUCKHORN ELECTRIC, LLC/DEVILAN
HAIRE; A.C. HOUSTON LUMBER
COMPANY; MIKE PUNNETT;
PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND
ELECTRIC; FERGUSON ENTERPRISES,
INC.; ROCKY MOUNTAIN
HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC;
WHITE BUILDERS, LLC; MIKE'S
WELDING AND METAL WORKS, LLC;
SENTINEL FIRE & SECURITY, INC.;

1 STEVE McCOY, d.b.a. McCOY'S)
2 PAINTING; CHRISTOPHER BRENNAN)
3 d.b.a. BRENNAN'S CARPET; and)
4 PAUL COOPER d.b.a. SUN VALLEY)
5 DRYWALL,)
6 Defendants.)

6 COMES NOW D.L. Evans Bank, pursuant to I.R.C.P. 54(d)(6) and hereby moves to
7 disallow costs in particular, the Plaintiff's request for award of attorneys fees which are not
8 recoverable in an action to foreclose a vendee's lien. This Motion is supported by a
9 Memorandum in Support hereof.

11 DATED this 26 day of May, 2010.

12 PARSONS, SMITH, STONE,
13 LOVELAND & SHIRLEY, LLP

14 
15 R.C. Stone
16 Attorney for D.L. Evans Bank

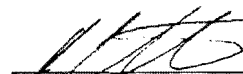
CERTIFICATE OF DELIVERY

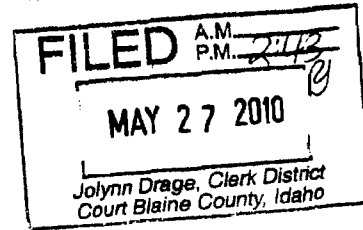
I hereby certify that on the 21 day of May, 2010, I served a copy of the foregoing
MOTION TO DISALLOW COSTS upon the following named person(s) in the manner listed
below:

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP


R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318



1 R.C. Stone
2
3
4 **PARSONS, SMITH, STONE,**
5 **LOVELAND & SHIRLEY, LLP**
6 137 West 13th Street
7 P.O. Box 910
8 Burley, Idaho 83318
9 (208) 878-8382 - Phone
(208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

10 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
11 STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE
12

13 LESLIE BENZ,)
14)

15 Plaintiff,)
16)

17 vs.)

Case No. CV-2009-613

OBJECTION TO INTEREST

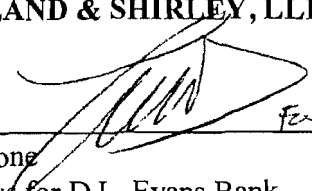
18 EAST AVENUE BLUFF, LLC, an Idaho)
19 limited liability company; D.L. EVANS)
20 BANK; TIMELESS DESIGN COMPANY;)
21 CLIFF R. IVERSON d.b.a. LEI'S)
22 CUSTOM TILE; FISHER APPLIANCE,)
23 INC.; VIEWPOINT, INC.; CAD)
24 DRAFTING SYSTEMS, INC.;)
25 BUCKHORN ELECTRIC, LLC/DEVILAN)
26 HAIRE; A.C. HOUSTON LUMBER)
COMPANY; MIKE PUNNETT;)
PRECISION PLUMBING, INC.;)
WATSON BUILDERS, INC.; HARRIS)
REFRIGERATION HEATING AND)
ELECTRIC; FERGUSON ENTERPRISES,)
INC.; ROCKY MOUNTAIN)
HARDWARE, INC.; SWEET'S)
PORTABLE WASTE SERVICES, LLC;)
WHITE BUILDERS, LLC; MIKE'S)
WELDING AND METAL WORKS, LLC;)

1 SENTINEL FIRE & SECURITY, INC.;)
2 STEVE McCOY, d.b.a. McCOY'S)
3 PAINTING; CHRISTOPHER BRENNAN)
4 d.b.a. BRENNAN'S CARPET; and)
5 PAUL COOPER d.b.a. SUN VALLEY)
6 DRYWALL,)
7 Defendants.)

8 COMES NOW Defendant, D.L. Evans Bank, and hereby objects to the interest being
9 sought by the Plaintiff. Defendant desires oral argument.

10 Dated this 26 day of May, 2010.

11 PARSONS, SMITH, STONE,
12 LOVELAND & SHIRLEY, LLP

13 
14 R. C. Stone
15 Attorneys for D.L. Evans Bank
16
17
18
19
20
21
22
23
24
25
26

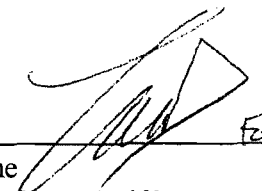
CERTIFICATE OF DELIVERY

I hereby certify that on the 26 day of May, 2010, I served a copy of the foregoing
OBJECTION TO INTEREST upon the following named person(s) in the manner listed below:

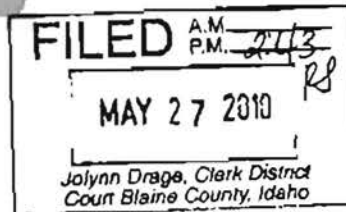
Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP



R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318



R.C. Stone
PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318
(208) 878-8382 - Phone
(208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,
Plaintiff,

Case No. CV-2009-613

vs.

MEMORANDUM IN OPPOSITION
TO REQUEST FOR ATTORNEYS
FEES AND PREJUDGMENT
INTEREST

EAST AVENUE BLUFF, LLC, an Idaho
limited liability company; D.L. EVANS
BANK; TIMELESS DESIGN COMPANY;
CLIFF R. IVERSON d.b.a. LEI'S
CUSTOM TILE; FISHER APPLIANCE,
INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.;
BUCKHORN ELECTRIC, LLC/DEVILAN
HAIRE; A.C. HOUSTON LUMBER
COMPANY; MIKE PUNNETT;
PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND
ELECTRIC; FERGUSON ENTERPRISES,
INC.; ROCKY MOUNTAIN
HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC;
WHITE BUILDERS, LLC; MIKE'S
WELDING AND METAL WORKS, LLC;

1 SENTINEL FIRE & SECURITY, INC.;)
2 STEVE McCOY, d.b.a. McCOY'S)
3 PAINTING; CHRISTOPHER BRENNAN)
4 d.b.a. BRENNAN'S CARPET; and)
5 PAUL COOPER d.b.a. SUN VALLEY)
6 DRYWALL,)
7 Defendants.)

8 This is not a personal action against D.L. Evans Bank. There was no contractual
9 relationship between Plaintiff and D.L. Evans Bank. D.L. Evans Bank did not benefit in
10 whole or in part from the Plaintiff's payments. The Plaintiff is not entitled to a monetary
11 judgment against D.L. Evans bank.

12 This is an action simply to establish the existence of a vendee's lien, its priority, and
13 obtain a decree of foreclosure. The question as to whether or not the Plaintiff is entitled to an
14 award of attorneys fees and prejudgment interest is simply a question of whether or not the
15 Plaintiff is entitled to fees and interest under the statute creating the lien. In *Farnsworth v.*
16 *Pepper*, 27 Idaho 154, 148 P.48 (1915), the Supreme Court established a principle that unless
17 the lien statute provided that it also covered attorneys fees, then attorneys fees were not
18 recoverable as costs in an action to foreclose a lien. In addressing the claim of a vendor's
19 lien, the Supreme Court states:

20
21 A petition for rehearing has been filed in this case, and the first point made
22 by the petitioner is that an attorney's fee of \$400 was allowed for the
23 foreclosure of said vendor's lien, while under the statute a vendor's lien is
24 only permitted as security for the unpaid purchase price and not for any
25 other indebtedness or liability, and 3 Pomeroy's Equity Jurisprudence, §
26 1251 and *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059, are cited.

27

28 As a matter of fact the trial court did adjudge that the attorney's fee allowed
29 should be a lien upon said premises. While section 3441, Rev. Codes,
30 provides for a vendor's lien upon property sold "for so much of the price as
31 remains unpaid and unsecured otherwise than by the personal obligation of

1 the buyer," under the provisions of said statute an attorney's fee for
2 foreclosing the lien is not made a lien upon the land sold. Therefore the
3 judgment in this case must be modified to the extent of holding said
attorney's fee not a lien upon the land in question.

4 148 P. 50.

5 The Supreme Court also applied the same ruling in a case involving an agister's lien.

6 I.C.A. § 44-705 makes no provision for attorney's fees which were therefore
7 improperly included in the lien foreclosure, but we may eliminate from the
8 proceeds of the sale to which respondent was entitled the attorney's fees,
9 without vitiating the sale because any balance of the sale proceeds are to be
paid to the owner, and in the absence of fraud and where the excess can be
segregated as it can here claim of excessive amount does not vitiate the lien.
10 Wheatcroft v. Griffiths, 42 Idaho, 231, 245 P. 71; Eskestrand v. Wunder, 94
11 Mont. 57, 20 P.(2d) 622; Shumway v. Woolwine, 84 Cal.App. 648, 103 P.
12 157; Snell v. Payne, 115 Cal. 218, 46 P. 1069 (second case). On the
argument on rehearing, respondent virtually admitted the attorney's fees
should be eliminated.

13
14 *Seafoam Mines Corporation v. Vaughn*, 56 Idaho 342, 53 P.2d 1166, 1170 (1936).

15 It would appear that the same rationale applicable to attorneys fees would also be
16 applicable to prejudgment interest. D.L. Evans Bank recognizes the language in *McMahon v.*
17 *Cooper*, 70 Idaho 139, 212 P.2d 657 (1949), recognizing the right to prejudgment interest.
18 D.L. Evans wishes to reserve this as an issue on appeal so that it might ask the Supreme Court
19 to reconsider the *McMahon* ruling.

20
21 As noted previously, prejudgment interest is not recoverable from the date of default,
22 only from the date of decision. D.L. Evans Bank also wishes to reserve this issue on appeal.

23 The Plaintiff's Memorandum of Costs has a number of items which need to be
24 addressed relative to its claim for attorneys fees. Again reiterating that this is an action to
25 establish and foreclose a vendor's lien, and not a personal direct action against D.L. Evans
26 Bank. D.L. Evans Bank appears of record as a senior, not a junior, lien holder due to the fact
that its Deed of Trust was recorded prior to the Plaintiff's Lis Pendens. As such, D.L. Evans

1 Bank was the necessary party and it was required that its rights be adjudicated in any
2 foreclosure proceeding as in any mortgage foreclosure proceeding. Plaintiff's Memorandum
3 of Costs concedes that the vendee's lien "is a rarely used and virtually unknown, Idaho
4 statute. There is very little Idaho case law in this area, and very little case law in the western
5 regions regarding a vendee's lien."
6

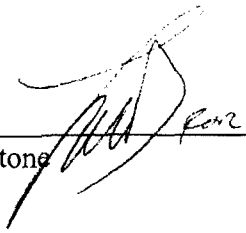
7 Plaintiff states "the bank commenced a foreclosure action on its mortgage on the
8 subject property. . . ." This is an incorrect statement. D.L. Evans Bank had a Deed of Trust.

9 Plaintiff claims attorneys fees under the provisions of Idaho Code §12-120(3) "as
10 prevailing party in a commercial transaction or as prevailing party on D.L. Evans action on a
11 note. There was no transaction between the Plaintiff and D.L. Evans Bank. There was no
12 privity of contract between them. D.L. Evans Bank did not bring an action on its note. D.L.
13 Evans Bank did not assert any right to affirmative relief against the Plaintiff beyond the scope
14 of the interest arising from its Deed of Trust lawfully recorded against the property. Actions
15 primarily involving property interests do not fall within the meaning of commercial
16 transactions. *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 962 P.2d 1041
17 (1998).
18

19 Finally, the Plaintiff's combined memorandum of costs and affidavit fail to meet the
20 standards of I.R.C.P. 54(e) and provide the requisite information for the Court to make the
21 findings required by I.R.C.P. 54(e)(3) in that it does not detail the date, amount of time and
22 service provided on an itemized basis, opting instead to provide conclusory statements only in
23 the body of the affidavit preventing an independent review and evaluation of the services
24 performed and costs incurred.
25
26

DATED this 24 day of May, 2010.

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP



R.C. Stone

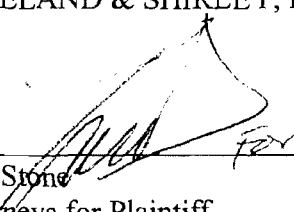
CERTIFICATE OF DELIVERY

I hereby certify that on the 24 day of May, 2010, I served a copy of the foregoing
MEMORANDUM IN OPPOSITION TO REQUEST FOR ATTORNEYS FEES AND
PREJUDGMENT INTEREST upon the following named person(s) in the manner listed
below:

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

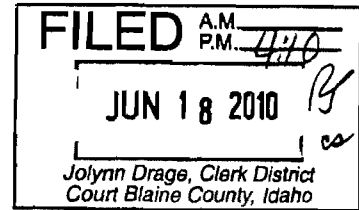
☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP



R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
 Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB# 2232
 Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,
 Plaintiff,

Case No. CV-2009-613

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company; D.L. EVANS BANK;
 TIMELESS DESIGN COMPANY; CLIFF R.
 IVERSON dba LEI'S CUSTOM TILE; FISHER
 APPLIANCE, INC.; VIEWPOINT, INC.; CAD
 DRAFTING SYSTEMS, INC.; BUCKHORN
 ELECTRIC, LLC/DEVILAN HAIRE; A.C.
 HOUSTON LUMBER COMPANY; MIKE
 PUNNETT; PRECISION PLUMBING, INC.;
 WATSON BUILDERS, INC.; HARRIS
 REFRIGERATION HEATING AND ELECTRIC;
 FERGUSON ENTERPRISES, INC.; ROCKY
 MOUNTAIN HARDWARE, INC.; SWEET'S
 PORTABLE WASTE SERVICES, LLC; WHITE
 BUILDERS, LLC; MIKE'S WELDING AND
 METAL WORKS, LLC; SENTINEL FIRE &
 SECURITY, INC.; STEVE McCOY, dba
 McCOY'S PAINTING; CHRISTOPHER
 BRENNAN dba BRENNAN'S CARPET; and
 PAUL COOPER dba SUN VALLEY DRYWALL,
 Defendants.

RESPONSIVE BRIEF IN SUPPORT
 OF REQUEST FOR
 ATTORNEY'S FEES AND COSTS
 AND PREJUDGMENT INTEREST

COMES NOW the Plaintiff, by and through her attorney of record, Janet C. Wygle of Luboviski, Wygle, Fallowfield & Ritzau, P.A., and provides this Responsive Brief in Support of her Request for Attorney's Fees and Costs and of the award of Prejudgment Interest.

STATUS OF CASE

Plaintiff filed this lawsuit pursuant to Idaho Code §45-804 to declare and enforce her Vendee's Lien on property which Plaintiff contracted to purchase from East Avenue Bluff LLC (hereinafter "Seller"). Defendant, D.L.Evans Bank (hereinafter "the Bank") granted a construction loan to Seller and obtained a Deed of Trust which was recorded against the property. Seller breached the contract by failing to close the transaction and by its inability to provide clear, marketable title to the property. In the Plaintiff's lawsuit, the main issue was the priority of the Vendee's Lien *vis-a-vis* the Bank. The Plaintiff also sought interest on her \$750,000.00 purchase deposit, to be included as part of the Vendee's Lien, and foreclosure of her Lien. During the pendency of the lawsuit, the Bank pursued foreclosure of its Deed of Trust against the property. The Plaintiff sought an injunction to stop the sale of the property pursuant to the Bank's foreclosure action. An injunction was granted and a bond amount set; however, before the bond was posted the Bank and the Plaintiff entered into a Stipulation allowing the foreclosure sale upon certain terms and conditions not at issue here. After discovery had been completed, the Plaintiff filed a motion for summary judgment, which this Court granted in the sum of \$750,000.00 plus interest from the date of default by Seller on May 19, 2010. The Plaintiff then filed her Memorandum of Costs and Affidavit of Attorney's Fees. The Bank then filed an Objection to Plaintiff's Order of Summary Judgment (without any Notice of Hearing), an Objection to Interest, a Motion to Disallow Costs, a Notice of Hearing on the Motion to Disallow Costs and on the Objection to Interest, and a Memorandum in Opposition to Request for

Attorneys Fees and Prejudgment Interest ("Memorandum in Opposition). On June 17, the Bank filed its Notice of Appeal.

ARGUMENT

The Bank's Objection to Interest states only that it "objects to the interest being sought by the Plaintiff." The Bank's Motion to Disallow Costs states only that it "moves to disallow costs in particular, the Plaintiff's request for award of attorneys fees which are not recoverable in an action to foreclose a vendee's lien." In its Memorandum in Opposition, the Bank (1) objects to the date from which prejudgment interest was calculated and, apparently, objects to accrued interest being a part of the Plaintiff's lien amount; (2) argues that attorney's fees are not awardable to Plaintiff under Idaho Code §12-120(3) because the case did not involve a "commercial transaction;" (3) argues that even if attorney's fees are awardable, the Memorandum of Costs and Affidavit of Attorney's Fees and Costs filed by Plaintiff fails to comply with I.R.C.P., Rule 54(e); and (4) asserts that any awarded attorney's fees are not part of the Plaintiff's lien amount.

A. The Bank's objection to the Plaintiff's attorney's fees and costs and to the interest awarded has been waived.

An objection to any items contained in a Memorandum of Costs must be specific and state the grounds and basis for each objection in the objection or motion itself. Failure to provide such specificity within the body of the motion constitutes a waiver of the right to object. *Nanney v. Linella, Inc.*, 130 Idaho 477, 943 P.2d 67 (Ct. App. 1997); *Wefco, Inc. v. Monsanto Co.*, 111 Idaho 55, 720 P.2d 643 (Ct. App. 1986). The Bank does not state any specific objections to any of the specific items of cost sought by Plaintiff and, therefore, waives any objections it might have to such claimed costs of right and discretionary costs. *Nanney v. Linella, Inc., supra; Wefco, Inc. v.*

Monsanto, supra.

In the *Nanney* case, a truck purchaser sued the truck dealership for breach of contract and conversion for repossessing the purchased truck. The truck purchaser prevailed on summary judgment against the dealership and submitted a memorandum of costs and fees. The dealership filed a motion to disallow the fees, which motion stated “[Petersen] . . . hereby objects to the attorney fees claimed as costs by plaintiff Nanney in his memorandum of costs by the filing and serving of this motion to disallow same on the grounds and for the reasons set forth in the memorandum defendant will file in support hereof.” 130 Idaho at 481. No supporting memorandum was filed by the dealership, and the purchaser-plaintiff filed a motion to strike the dealership’s objection because the motion failed to specify the grounds and basis for such objection. The trial court struck the dealership’s objection and awarded the plaintiff the full amount of fees sought. On appeal, the Court of Appeals upheld the trial court’s decisions, stating, in pertinent parts, as follows:

A failure to timely object to any items in the cost memorandum constitutes a waiver of all objections to the amount claimed. I.R.C.P. 54(d)(5); *Hooper v. State*, 127 Idaho 945, 949, 908 P.2d 1252, 1256 (Ct. App.1995). Rule 54(d)(6) “is designed to establish a deadline for informing the court of any objection to items claimed in the memorandum of costs” and “enables the trial court expeditiously to rule upon such objections and bring the case to a conclusion.” *Operating Engs. Local Union 370 v. Goodwin Const. Co. of Blackfoot*, 104 Idaho 83, 85, 656 P.2d 144, 146 (Ct.App.1982).

Also significant is I.R.C.P. 7(b)(1), which requires that motions “state with particularity the grounds therefor” and that they “set forth the relief or order sought.” This requirement of particularity is “real and substantial,” and good practice “demands that the basis of a motion and the relief sought shall be clearly stated” so that the other party will not suffer surprise or prejudice. *Patton v.*

Patton, 88 Idaho 288, 292, 399 P.2d 262, 264 (1965). Petersen's motion satisfies neither the "particularity" nor the "relief or order sought" criteria of Rule 7(b), for it neither tells the claimant what grounds for objection he must be prepared to meet at the hearing nor discloses whether the relief sought is complete disallowance of all the requested fees and costs or only a portion thereof.

* * *

In prior cases we have held that the potential grounds for an objection to a cost memorandum are waived if they were not included in the stated bases for the motion to disallow costs or fees filed with the trial court. *Devine v. Cluff*, 110 Idaho 1, 5, 713 P.2d 437, 441 (Ct.App.1985) (holding that challenge to the amount of attorney fees was not preserved for appeal where appellant's objection challenged only the entitlement to fees); *Camp v. Jiminez*, 107 Idaho 878, 883, 693 P.2d 1080, 1085 (Ct.App.1984) (holding that because appellant's initial objection in trial court did not mention lack of verification of the cost memorandum, objection on that basis was not timely). Accordingly, when no ground for objection at all is stated in the motion, none is preserved.

Petersen's motion to disallow fees did not comply with I.R.C.P. 7(b)(1), 54(d)(6) and 54(e)(6) because the motion did not specify any basis or grounds for the objection. We therefore find no error in the trial court's order striking the motion.

130 Idaho at 481-482.

The Bank's Motion to Disallow Costs and Objection to Interest filed in this case present a very similar scenario: the Motion to Disallow Costs is very sparse and states that attorneys fees "are not recoverable in an action to foreclose a vendee's lien" as the only grounds for disallowing attorney's fees to Plaintiff herein. There is no objection to the amount of attorney's fees sought; only to the entitlement to fees in a vendee's lien foreclosure case. In addition, the Bank made no objection to either the amounts or the grounds given by Plaintiff for an attorney's fees award

against the Bank under Idaho Code §12-121 and under I.R.C.P., Rule 37(c) in sub-paragraphs 6.B. or 6.C. of its Memorandum of Costs. The Bank's Objection to Interest states no grounds for such objection and does not incorporate by reference any other document. Therefore, neither the Bank's Objection to Interest nor its Motion to Disallow Fees and Costs complies with I.R.C.P., Rule 7(b)(1), Rule 54(d)(6), or Rule 54(e)(6) or the Idaho case law cited above. Therefore, the Bank has waived all objections to the Plaintiff's interest calculations and all objections to the Costs as a Matter of Right and the Discretionary Costs and all objections to attorney's fees except for the grounds that fees are not awardable in a vendee's lien foreclosure action.

Despite the paucity of grounds asserted by the Bank in its Motion, and despite the Bank's waiver of its right to object to the interest or to attorney's fees on any grounds other than the *Farnsworth v. Pepper* rule cited by the Bank (see above), the Plaintiff presents the following response to issues and claims addressed in the Bank's Memorandum in Opposition because they require rebuttal even though such Memorandum was not incorporated by reference into the Motion or the Objection.

B. Interest should commence to accrue upon East Avenue Bluff LLC's breach of its contract with Plaintiff.

The Bank argues in its Memorandum in Opposition that prejudgment interest is only recoverable from the date of rescission (the Plaintiff assumes the Bank meant "rescission" and not "decision" as stated in the Memorandum), not the date of default. The leading Idaho case of *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949) allowed prejudgment interest to the vendee, and included such interest in the vendee's lien being foreclosed, but failed to state any accrual date. Thus, Idaho law allows interest on the vendee's lien amount to be added to the lien amount and included in the foreclosure, but doesn't state when it commences to accrue. Plaintiff

believes that the date of default is the correct date from which to calculate interest in this case.

As stated in 92 C.J.S. Vendor & Purchaser §571a, the inclusion of interest in a vendee's lien being foreclosed upon is allowed in most states which recognize vendee's liens. 92 C.J.S. Vendor & Purchaser §571a, and the federal, Arizona, California, Illinois, Iowa, Kansas, New Jersey, New Mexico, New York, North Dakota, Oregon and Washington cases cited in footnote 4 on page 608 thereof. The *McMahon* court was following the general rule regarding a vendee's right to recover the purchase price with interest thereon.

Regarding when such interest commenced to accrue, *Corpus Juris Secundum* states:

Although under the circumstances interest may start to run from some other time, as a general rule, where the vendor refuses or is unable to perform his contract, interest runs from the time the payment was made.

92 C.J.S. Vendor & Purchaser §571c at page 612. See, *Thompson v. Huston*, 135 P.2d 834, 17 Wash.2d 457 (1943). Under the terms of the Plaintiff's contract with East Avenue Bluff LLC (hereinafter "the Seller"), the Plaintiff knew she was making deposits on the purchase price of a building not yet erected. The contract did not provide for any interest to accrue on such deposits and both Plaintiff and the Seller knew that the Seller would be retaining the benefit of such deposits until the transaction closed. In addition, the Plaintiff allowed two extensions on the closing date, as requested by the Seller, without requesting interest or additional credit on her deposit. However, when the Seller could not close and provide clear title to the property, such default ended the Seller's right to use Plaintiff's money under the Real Estate Purchase and Sale Agreement and required a refund to Plaintiff of all deposits. Therefore, in this case, the appropriate date on which interest on such deposits should run is the date of default rather than the earlier dates of payment. As of the default date, the repayment of the deposits was "due"

from Seller to Plaintiff. [After the date of default and before any legal action or foreclosures had been commenced against the Seller, the individual members of the Seller filed bankruptcy and ended any personal liability to the Plaintiff. The Seller, having been under-capitalized, and having no assets except the land which was the subject of the purchase and sale transaction, became "judgment proof."] Moreover, the issue of when interest accrues has nothing to do with the Bank or its defenses; it is part of the equitable Vendee's Lien against the Seller's property. Such lien's priority over the Bank's Deed of Trust lien is not justification to reduce the amount properly due to Plaintiff by Seller. Therefore, the interest which this Court added to the amount of Plaintiff's Vendee's Lien was properly and accurately calculated and added to the Vendee's Lien amount.

C. Plaintiff's Memorandum of Costs and Affidavit of Attorney's Fees complied with I.R.C.P., Rule 54(e)(3).

The Bank also claims that the Plaintiff's Memorandum of Costs and Affidavit of Attorney's Fees "fails to meet the standards of I.R.C.P. 54(e)." The Bank asserts that detail regarding "the date, amount of time and service provided on an itemized basis" is required by the rule. This is incorrect. I.R.C.P., Rule 54(e)(5) states the requirements of what must be included in the affidavit, namely, "the basis and method of computation of the attorney fees claimed." An attorney's hourly time sheets showing the information the Bank asserts is required is NOT a prerequisite to an award of attorney's fees. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct.App. 1985).

D. Attorney's Fees are awardable against the Bank.

The Plaintiff agrees that the attorney's fees she incurred to prove the existence and validity of her Vendee's Lien, if awarded, would not be part of her lien under *Farnsworth v.*

Pepper, 27 Idaho 154, 148 P. 48 (1915) and *Seafoam Mines Corporation v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936), cited by the Bank. However, the attorney's fees sought against the Bank under §12-121 and I.R.C.P. Rule 37(c) and regarding the Stay of Foreclosure proceeding are properly sought and recoverable under the rules due to the Bank's actions. The Bank sought to foreclose its Deed of Trust while this action was pending, necessitating the Plaintiff's Motion for Stay. The legal services provided to Plaintiff in that regard are not really chargeable to the Seller, but are actually awardable to Plaintiff as the prevailing party in that "mini-dispute" against the Bank. Such fees should be included in the judgment against the Bank, but not as part of the vendee's lien.

The Bank alleged three unfounded and frivolous affirmative defenses, regarding which it presented no evidence whatsoever. The legal services Plaintiff required to defend against such frivolous affirmative defenses cannot reasonably be chargeable against the Seller and should be charged against the Bank itself in the final judgment pursuant to Idaho Code §12-121.

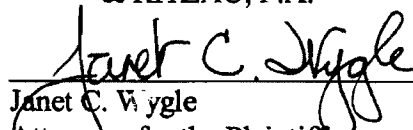
Finally, the Bank refused to admit that it had had a copy of the Plaintiff's contract with the Seller in its loan files prior to approving its loan to Seller and maintained that denial throughout the entire proceeding, forcing the Plaintiff to prove that fact. The Plaintiff was successful in proving that the contract had been in the Bank's loan file(s) and that the originating bank loan officer had included the terms pertinent to the Plaintiff's Vendee's Lien issue in the 4-page Commercial Loan Memorandum. I.R.C.P., Rule 37(c) provides for a mandatory award of attorney's fees under such circumstances, which award should be against the Bank. *Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001); *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988).

All three of the above-recited actions were taken by the Bank in pursuit of its own

interests. Therefore, even though there was no contractual relationship between the Bank and the Plaintiff, this case was NOT “an action simply to establish the existence of a vendee’s lien, its priority, and obtain a decree of foreclosure” as argued by the Bank. The Bank took action on its own behalf and engaged in conduct which greatly increased the legal fees Plaintiff incurred in this lawsuit. The facts were mostly undisputed except where the Bank’s affirmative defenses and denial of requested admissions was concerned. The Bank’s attempts to revise history were defeated by the Plaintiff, but at significant cost to her. An award of attorney’s fees to the Plaintiff and against the Bank itself, although not part of Plaintiff’s Vendee’s Lien, is appropriate.

DATED this June 17, 2010.

LUBOVISKI, WYGLE, FALLOWFIELD
& RITZAU, P.A.



Janet C. Wygle
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

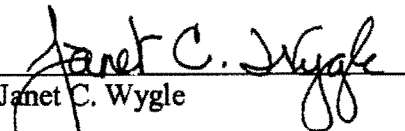
I HEREBY CERTIFY that on the 18th day of June, 2010, I served a true and correct copy of the within and foregoing document upon the following attorney, in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

_____ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Ketchum, Idaho.

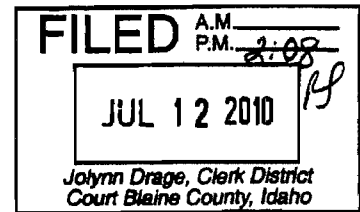
_____ By hand delivering copies of the same.

☒ By transmitting copies of the same to said attorneys by facsimile machine process.



Janet C. Wygle

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB No. 2232



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
liability company; D.L. EVANS BANK;
TIMELESS DESIGN COMPANY; CLIFF R.
IVERSON dba LEI'S CUSTOM TILE; FISHER
APPLIANCE, INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.; BUCKHORN
ELECTRIC, LLC/DEVILAN HAIRE; A.C.
HOUSTON LUMBER COMPANY; MIKE
PUNNETT; PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND ELECTRIC;
FERGUSON ENTERPRISES, INC.; ROCKY
MOUNTAIN HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC; WHITE
BUILDERS, LLC; MIKE'S WELDING AND
METAL WORKS, LLC; SENTINEL FIRE &
SECURITY, INC.; STEVE McCOY, dba
McCOY'S PAINTING; CHRISTOPHER
BRENNAN dba BRENNAN'S CARPET; and
PAUL COOPER dba SUN VALLEY DRYWALL,

Defendants.

Case No. CV-2009-613

MOTION FOR ATTORNEY'S
FEES PURSUANT TO I.R.C.P.
RULE 37(c) AND
NOTICE OF HEARING THEREON

MOTION FOR ATTORNEY'S FEES PURSUANT TO I.R.C.P. RULE 37(C)
AND NOTICE OF HEARING THEREON/1

COMES NOW the Plaintiff, by and through her attorney of record, Janet C. Wygle of Luboviski, Wygle, Fallowfield & Ritzau, P.A., and moves this Court for an Order awarding her attorney's fees in the sum of \$16,920.00 against the Defendant, D.L. Evans Bank (hereinafter "the Bank"), pursuant to I.R.C.P., Rule 37(c) on the grounds that the Bank denied Plaintiff's Request for Admission No. 2 which requested "Admit that D.L. Evans Bank knew, or should have known, the terms of the purchase and sale contract between East Avenue Bluff, LLC and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff LLC " and the Plaintiff was required to prove such fact in order to prevail on her Motion for Summary Judgment, which she did.

This motion is based upon the record and file in this case, and upon the Affidavit of Janet C. Wygle, filed herewith.

FURTHER, PLEASE TAKE NOTICE that the Plaintiff will call for hearing her Motion for Attorney's Fees Pursuant to I.R.C.P., Rule 37(c) before the above-named Court on Monday, August 2, at 11:00 a .m., at the Judicial Building in Hailey, Idaho, or as soon thereafter as counsel may be heard.

Oral argument is requested and a Brief will be filed within 14 days.

DATED this 8th day of July, 2010.

LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

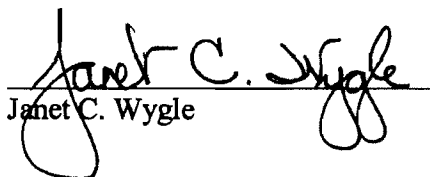
By Janet C. Wygle
Janet C. Wygle
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I served a true and correct copy of the within and foregoing document upon the attorney named below in the manner noted:

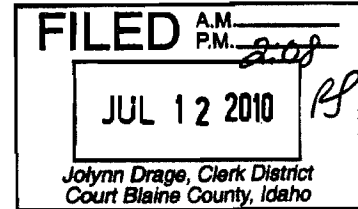
R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

- ☐ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.
- ☐ By hand delivering copies of the same to the offices of the attorney.
- ☒ By transmitting copies of the same to said attorney by facsimile machine process.


Janet C. Wygle

Janet C. Wygle
**LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.**

Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB# 2232
Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
liability company; D.L. EVANS BANK;
TIMELESS DESIGN COMPANY; CLIFF R.
IVERSON dba LEI'S CUSTOM TILE; FISHER
APPLIANCE, INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.; BUCKHORN
ELECTRIC, LLC/DEVILAN HAIRE; A.C.
HOUSTON LUMBER COMPANY; MIKE
PUNNETT; PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND ELECTRIC;
FERGUSON ENTERPRISES, INC.; ROCKY
MOUNTAIN HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC; WHITE
BUILDERS, LLC; MIKE'S WELDING AND
METAL WORKS, LLC; SENTINEL FIRE &
SECURITY, INC.; STEVE McCOY, dba
McCOY'S PAINTING; CHRISTOPHER
BRENNAN dba BRENNAN'S CARPET; and
PAUL COOPER dba SUN VALLEY DRYWALL,

Defendants.

Case No. CV-2009-613

AFFIDAVIT OF JANET C. WYGLE
IN SUPPORT OF MOTION FOR
ATTORNEY'S FEES PURSUANT
TO I.R.C.P., RULE 37(c)

STATE OF IDAHO)
) ss.
County of Blaine)

I, Janet C. Wygle, being first duly sworn on oath, depose and state as follows:

1. I am the attorney of record for the Plaintiff, Leslie Benz, and I make this affidavit based upon my own personal knowledge and belief and am fully competent to testify to the facts stated herein.

2. Pursuant to I.R.C.P., Rule 37(c), the Plaintiff is seeking an award of attorney's fees in the sum of \$16,920.00 based on the Bank's denial of Plaintiff's Request for Admission No. 2 and the Plaintiff's subsequent proof of the denied fact. A true and correct copy of Request for Admission No. 2, and the Defendant's Response is attached hereto as Exhibit "A" and incorporated herein by this reference. The Bank provided a copy of the Purchase and Sale contract to Plaintiff as part of its discovery and the terms of the contract were recited in part in the Commercial Loan Memorandum. The Bank's denial of this fact was not revised after either Ms. Benz's or Mr. Hunsaker's depositions and remained "at issue" as of the Summary Judgment argument. The Plaintiff proved, as part of her Summary Judgment motion, that the Bank had had a copy of, and known the terms of, such purchase and sale contract from July, 2007, prior to the loan being granted.

3. The Bank's Answer to Complaint, filed August 25, 2009, raised the issue of the Bank's knowledge of Ms. Benz's possible vendee's lien claim. On September 2, 2009, I served Plaintiff's Interrogatories, Requests for Admissions, and Requests for Production of Documents on the Bank. On September 11, 2009, I received the Bank's response to my Request for Admission No. 2.

4. On or about October 24, 2009, I received a very large number of documents, in no

apparent order and not labeled as responsive to any specific Request, as the Bank's Response to my Request for Production of Documents. I turned those documents over to my paralegal to review and organize. My paralegal found and brought to my attention the Loan Analyst Addendum and the Commercial Loan Memorandum, which I considered to be "smoking guns" on the issue of whether the Bank "knew or should have known" about the terms of the contract between EAB and Ms. Benz.

5. On or about November 6, 2009, I filed a Motion to Compel Answers to Interrogatories. On November 13, 2009, I received the Bank's Answers to Interrogatories. A true and correct copy of the Bank's Answers to Interrogatories No. 2 and No. 7 is attached hereto as Exhibit "B" and incorporated herein by this reference.

6. On February 1, 2010, I took the deposition of Bruce Hunsaker, the person who had signed the Bank's responses to the Plaintiff's discovery requests. I inquired whether the Bank's former denial of knowledge of Ms. Benz's contract with EAB was still the Bank's position. Mr. Hunsaker's response was anything but an admission of the previously denied fact. A true and correct copy of the pertinent portions of Mr. Hunsaker's deposition is attached hereto as Exhibit "C" and incorporated herein by this reference.

7. On April 5, 2010, I filed the Plaintiff's Motion for Summary Judgment, arguing that the Bank had actual notice of her purchase contract with EAB, and all of the deposit release provisions, and therefore, the Bank's deed of trust lien was subordinate to the Plaintiff's Vendee's Lien.

8. In ruling on the Plaintiff's Summary Judgment motion, this court announced its finding that the Bank had "actual notice" of the Plaintiff's contract with EAB, and, in fact, relied upon that

contract is determining to make the construction loan to EAB.

9. In this case, I considered the two significant and disputed issues to be the notice the Bank had of the possible Vendee's Claim and the affirmative defenses raised by the Bank. The notice issue was the major issue because it was determinative of the Bank's lien priority.

10. Between September 11, 2009, and entry of this court's Order on the Plaintiff's Motion for Summary Judgment on May 19, 2010, I spent 46.7 hours providing the following services with regard to proving the denied fact, and I spent 9.7 hours providing services regarding recovering the Plaintiff's attorney's fees based on I.R.C.P., Rule 37 (c), for a total of 56.4 hours:

9/17/09	Review Bank's Response to RFA	.3	\$ 90.00
10/15/09	Call to Stone re: discovery past due	.2	\$ 60.00
11/4/09	Preliminary review of 1244 pages of docs provided by DLEB	1.7	\$ 510.00
11/5/09	Work with paralegal regarding DLEB's documents and sorting for evidence	.4	\$ 120.00
11/6/09	Prepare Motion to Compel Answers to Interrogs; prepare Affidavit in Support of Motion to Compel (1.8 of 3.0 hours)	1.8	\$ 540.00
11/29/09	Read DLEB's Objections and Responses to Interrogs; notes to file; begin research on effect of Bank's knowledge	3.4	\$1,020.00
11/29/09	Paralegal: billing for review, sort and organize DLEB documents and potential evidence of knowledge	3.0	\$ 225.00
11/30/09	Conference with paralegal re: documents for Summary Judgment motion	.4	\$ 120.00
12/7/09	Conference with client re: deposition by DLEB re: notice/knowledge (.4 of 1.5)	.4	\$ 120.00
12/8/09	Deposition of client by DLEB; conference with client and travel time (.5 of 2.5)	.5	\$ 150.00
1/14/10	Review Answers to Interrogs re: DLEB witnesses; set up deposition of Hunsaker; prepare Notice of Deposition of Hunsaker and Duces Tecum list (.6 of 1.1)	.6	\$ 180.00
1/31/10	Prepare questions and exhibits for Hunsaker deposition; review Answer to Complaint and Answers to Interrogs, etc. (2.3 of 4.6)	2.3	\$ 690.00

2/1/10	Deposition of Hunsaker; travel time (3.9 of 7.9 re: notice)	3.9	\$1,170.00
2/2/10	Review index of additional discovery produced at Hunsaker deposition on CD with paralegal	.3	\$ 90.00
2/11/10	Review Hunsaker depo. for Summ. Jdmt excepts and documents re: notice	1.5	\$ 450.00
2/12/2010	Work on Summary Judgment outline re: notice and knowledge of contract by DLEB	.5	\$ 150.00
2/17 & 20/09	Paralegal: billing for reviewing documents on disc from DLEB re: notice and knowledge of contract by DLEB and conf. w/ attorney (4.5 of 6.2)	4.5	\$ 337.50
2/24/10	Conference with paralegal re: docs	.4	\$ 120.00
3/2/10	Research; work on Summ. Jdmt brief (1.9 of 2.9)	1.9	\$ 570.00
3/5/10	Research; work on Summ Jdmt brief (1.0 of 1.5)	1.0	\$ 300.00
3/25/10	Work on Summary Jdmt brief re: Aff Defenses and effect of knowledge; research (2.2 of 4.4)	2.2	\$ 660.00
3/29/10	Begin draft Aff. In Support of Summ. Jdmt; schedule S. J. Hearing (.7 of 1.4)	.7	\$ 210.00
3/30/10	Work on JCW Affidavit & exhibits for S.J. (2.2 of 4.4)	2.2	\$ 660.00
4/1/10	Complete JCW Aff. & exhibits for S.J. (.4 of .7)	.4	\$ 120.00
4/2/10	Finalize S.J. Brief; draft Motion for S.J.; prepare Notice of Hrg; revise Aff. of JCW (.6 of 1.2)	.6	\$ 180.00
4/22/10	Read DLEB's Brief Opposing S.J.; research; begin draft Reply Brief (2.2 of 4.4)	2.2	\$ 660.00
4/23/10	Work on Reply Brief; research (1.2 of 2.4)	1.2	\$ 360.00
4/26/2010	Research; complete draft of Reply Brief; Revise and finalize Reply Brief; review pretrial statement from Stone (1.5 of 3.1)	1.5	\$ 450.00
4/29/10	Preparation of pre-trial conference memo (1.0 of 2.1)	1.0	\$ 300.00
5/3/10	Review briefs, cases & depositions re: S.J. Motion argument; S.J. hearing; travel time; call to client (2.3 of 4.6)	2.3	\$ 690.00
5/12/10	Draft S.J. Order (1.5 of 2.9)	1.5	\$ 450.00

5/17/10	Prepare Memo of Costs and Atty's Fees re: Rule 37(c) claim; research (1.9 of 8.3)	1.9	\$ 570.00
5/27/10	Read Obj. to Costs, Notice of Hearing, and Brief in Support of Objections; research cases cited by DLEB (.7 of 2.10)	.7	\$ 210.00
6/15/10	Research and draft Brief in Support of Atty's Fees (2.5 of 8.2)	2.5	\$ 750.00
6/29/10	Prepare for hearing; hearing on Atty's Fees and Interest objections (1.3 of 2.9)	1.3	\$ 390.00
7/6/10	Prepare new Motion for Atty's Fees under Rule 37(c); prepare new itemized Affidavit in Support of Fees; research; draft Brief	5.2	\$1,560.00
TOTALS		56.4	\$16,920.00

11. CONSIDERATIONS UNDER I.R.C.P., Rule 54(e)(3)

A. This was a novel case involving a Vendee's Lien under Idaho Code §45-804, its proof, validity and priority over other liens. There is very little Idaho case law in this area. I did both computer research and index research, totaling in excess of 31 hours. I did substantial amounts of research on the issue of the vendee's lien accrual date, the effect of notice and/or knowledge on the priority of claims, and the priority of later-paid amounts. All of these were novel issues with very little case law available. Admittedly, some of the research did not result in a useful case, but all of it was educational, and led to the arguments and legal support which the Court found persuasive. There were thousands of pages of documents to be dealt with in order to find the "smoking gun" regarding the knowledge of the Bank prior to funding the loan to EAB. Most of Mr. Hunsaker's deposition dealt with loan procedures of the Bank and the knowledge of the Senior Loan Committee at the time it approved the loan and later when it refused to go through with the closing of the sale to Ms. Benz.

B. See discussion in sub-paragraph A, above.

C. Counsel for Plaintiff has been a licensed attorney since 1976, and has represented contractors, sub-contractors and homeowners in lien disputes for over 30 years; however, this was a totally different type of lien. Counsel for Plaintiff has been involved in at least 6 trials in construction disputes and many more litigation cases which were resolved without trial. Counsel for Plaintiff has a good track record of successful resolutions of construction dispute cases, both with and without trials. This case required familiarity with several areas of the law, an ability to extrapolate from existing case law, and an ability to argue for extensions of existing case law. This case was novel and more of a legal challenge than any standard mechanic's lien lawsuit.

D. I charged my client \$300.00 per hour for the services I performed for her and I believe such hourly rate to be reasonable and similar to the hourly rates charged by other attorneys with similar experience for similar work in Blaine County, Idaho. I have practiced in the area of general litigation since 1976. Attorneys in the Blaine County, Idaho area with at least 30 years of litigation experience (e.g., Edward Lawson, Terry Hogue, Bruce Collier, Doug Aanestad) charge between \$250 and \$350 per hour for such litigation. I have similar experience and my hourly rate is similar to their hourly rates. I bill in minimum increments of 1/10 of an hour. I also charged my client \$75.00 per hour for my paralegal's services related to discovery, billed in the same increments as I bill.

E. Pursuant to a written contract for legal services, I charged the Plaintiff a fixed hourly fee of \$300.00 plus costs.

F. There were no special time constraints. The case was resolved on Summary Judgment six weeks before trial.

G. The Plaintiff's claim was for \$750,000.00, plus interest and attorney's fees. The Bank's

claim was for \$2.6 million. The property was originally worth over \$3 million, but is now worth less than \$2 million, so there were substantial amounts of money at risk. The Plaintiff prevailed fully upon her claim in that the full amount of the Plaintiff's Vendee's Lien, plus interest, was declared superior to the Bank's deed of trust in the Summary Judgment order. The Bank's affirmative defenses were denied and the Plaintiff was awarded the full amount of her claim, with priority over the Bank. The Plaintiff is clearly the prevailing party.

H. A case like this will be rare because very few buyers would release non-refundable purchase money to the vendor and have the peculiar facts of this case. However, this case and the Court's decision has educated many attorneys and several banks to the rare incidence of a Vendee's Lien and advanced the body of law in this area.

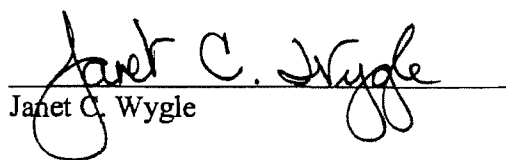
I. The Plaintiff is a client of Terry Hogue, who referred her to me for this litigation when he had a conflict.

J. I am unaware of any similar cases during my 32 years of law practice.

K. Although Computer Assisted Legal Research was used in this case, the Plaintiff was not charged for it because my law firm maintains a monthly subscription.

L. The Court should consider that the Bank should have amended their Responses to Interrogatories and to the Requests for Admission, which would have reduced the contested issues and saved a lot of attorney's fees.

12. To the best of my knowledge and belief the items of costs included herein are correct and the costs claimed are in compliance with I.R.C.P., Rule 54(d)(5).

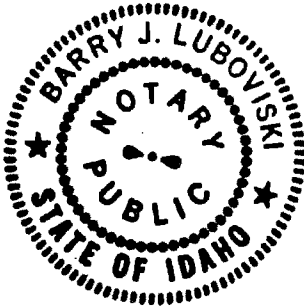

Janet C. Wygle

SUBSCRIBED AND SWORN to before me this 8th day of July, 2010.

Barry J. Luboviski

Notary Public for Idaho

My commission expires: 11-7-'13



CERTIFICATE OF SERVICE

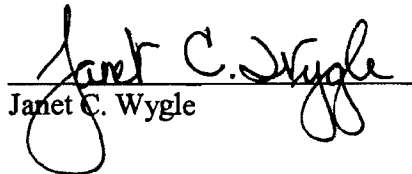
I HEREBY CERTIFY that on the 9th day of July, 2010, I served a true and correct copy of the within and foregoing document upon the following attorney, in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

☐ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Ketchum, Idaho.

☐ By hand delivering copies of the same.

☒ By transmitting copies of the same to said attorneys by facsimile machine process.


Janet C. Wygle

1 WELDING AND METAL WORKS, LLC;)
2 SENTINEL FIRE & SECURITY, INC.;)
3 STEVE McCOY, d.b.a. McCOY'S)
4 PAINTING; CHRISTOPHER BRENNAN)
5 d.b.a. BRENNAN'S CARPET; and)
6 PAUL COOPER d.b.a. SUN VALLEY)
7 DRYWALL,)
8 Defendants.)

9 COMES NOW the Defendant, D.L. EVANS BANK, who responds to the request for
10 admissions of Plaintiff as follows:

11 REQUESTS FOR ADMISSION

12 REQUEST FOR ADMISSION NO. 1: Admit that D.L. Evans Bank required a
13 contract for the pre-sale of the first townhouse to be built by East Avenue Bluff LLC as a
14 condition of approving your loan to East Avenue Bluff LLC.

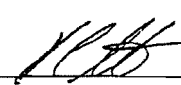
15 RESPONSE TO REQUEST FOR ADMISSION NO. 1: Deny.

16 REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or should
17 have known, the terms of the purchase and sale contract between East Avenue Bluff LLC and
18 Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to
19 East Avenue Bluff LLC.

20 RESPONSE TO REQUEST FOR ADMISSION NO. 2: Deny.

21 DATED this 10 day of September, 2009.

22 PARSONS, SMITH & STONE, LLP

23
24 
25 R. C. Stone
26 Attorneys for Plaintiff

D.L. EVANS BANK'S RESPONSE TO REQUEST FOR ADMISSIONS - 2

EXHIBIT

A

1 WHITE BUILDERS, LLC; MIKE'S)
2 WELDING AND METAL WORKS, LLC;)
3 SENTINEL FIRE & SECURITY, INC.;)
4 STEVE McCOY, d.b.a. McCOY'S)
5 PAINTING; CHRISTOPHER BRENNAN)
6 d.b.a. BRENNAN'S CARPET; and)
7 PAUL COOPER d.b.a. SUN VALLEY)
8 DRYWALL,)
9 Defendants.)

10 COMES NOW the Defendant, D.L. Evans Bank, who hereby objects to the
11 "Definitions and Instructions" set forth on pages 2-5 of the Plaintiff's First Interrogatories,
12 Requests for Admission, and Requests for Production of Documents to Defendant D.L. Evans
13 Bank for the reason that they are not recognized by the Idaho Rules of Civil Procedure and
14 are, therefore, beyond the scope of permissible discovery and, if deemed substantively
15 questions relating to each interrogatory, then consider the subparts are in excess of the
16 limitation of IRCP 33(a)(3), limiting the party to service of no more than 40 interrogatories in
17 which subparts of interrogatories shall count as separate interrogatories.

18 INTERROGATORY NO. 1: State the name(s) and position(s) of employment of the
19 person(s) answering this discovery request on behalf of D.L. Evans Bank.

20 ANSWER TO INTERROGATORY NO. 1: Bruce Hunsaker, Vice President of D.L.
21 Evans Bank.

22 INTERROGATORY NO. 2: Please state each and every fact, belief or opinion upon
23 which you base your denial of the allegations contained in paragraphs XXVII-XXXIII of
24
25
26

D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 2

EXHIBIT

B

1 Count One of Plaintiff's Complaint, and for each such fact provide the relevant date(s) and
2 participating individuals.

3 ANSWER TO INTERROGATORY NO. 2: XXVII – the portion of the allegation was
4 denied because the books and records of D.L. Evans Bank and current employees of D.L.
5 Evans Bank are without personal knowledge or the ability to find as to whether or not the
6 personal check attached as Exhibit E is a true and correct copy. In addition, whether and
7 when funds were released to defendant EAB, LLC is also not established. D.L. Evans Bank
8 was to get \$187,000.00 from those funds, which it never received. Discovery is continuing
9 into these factual matters. The current employees of the Bank having first-hand knowledge
10 are the senior loan committee, comprised of Bruce Hunsaker, Scott Horsley, John Evans, Jr.,
11 John Evans, Sr., George Gorton, J.V. Evans, Jim Lynch, Glen Kuneau, Don Evans and Kevin
12 Smith.
13
14

15 XXVIII – The allegations of paragraph XXVIII contain legally conclusory allegations
16 such as “materially breached”, “timely complete”, “did not and could not provide clear and
17 marketable title”, “material breaches”, “failure of consideration”. In addition Exhibit F
18 referred to in the allegation is not attached to the Complaint. The records of D.L. Evans Bank
19 previously provided, and the personal knowledge of the persons identified in the preceding
20 interrogatory, leads D.L. Evans Bank to conclude that EAB, LLC did not materially breach its
21 obligations, did timely complete construction in the subdivision and could have provided clear
22 and marketable title by discharging any claims, mortgages or liens. D.L. Evans Bank does not
23
24
25
26

D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 3

1 have records or personal knowledge showing any written notice by the Plaintiff to Defendant
2 EAB, LLC.

3 XXIX – This allegation alleges a legal conclusion only, without any allegation of fact.
4 D.L. Evans Bank believes that Plaintiff is not entitled to a vendee's lien nor the other legal
5 conclusions in that allegation.
6

7 XXX – Amongst other things, allegations in this paragraph include a representation of
8 a letter between counsel during the settlement negotiation which is not a proper allegation. At
9 this stage of the review of D.L. Evans records, there is no confirmation that D.L. Evans Bank
10 required a copy of the agreement, nor that it was informed that the Plaintiff had allowed or,
11 would be allowing the release of the earnest money as alleged.

12 XXXI – This allegation broadly states that all of the defendants are subordinate to
13 Plaintiff's vendee's lien, which is a legal conclusion. D.L. Evans Bank does not agree that the
14 Plaintiff's vendee's lien is a legal claim.
15

16 XXXII – D.L. Evans Bank is without information or belief as to the allegations in this
17 paragraph and deny the same pending further discovery.
18

19 XXXIII – This is an attorney fee allegation, which has been denied.

20 All responses to this interrogatory are based upon the state of knowledge of D.L.
21 Evans Bank and the state of its current review of its own extensive documentation as of this
22 date. It is based upon the personal knowledge of the persons identified above, the senior loan
23 committee. Discovery is ongoing and D.L. Evans Bank reserves the right to supplement this
24 response.
25

26 D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 4

1 ~~INTERROGATORY NO. 5: please state each and every fact, belief or opinion upon~~
2 ~~which you base your Third Affirmative Defense that the Plaintiff waiver her priority, and for~~
3 ~~each such fact provide the relevant date(s) and participating individuals.~~

4 ~~ANSWER TO INTERROGATORY NO. 5: The allegations to Interrogatory No. 3~~
5 ~~and Interrogatory No. 4 relating to first and second affirmative defenses also set forth the third~~
6 ~~affirmative defense in that the Plaintiff's conduct or actions lead D.L. Evans Bank to~~
7 ~~reasonably conclude that D.L. Evans Bank was perfected in a first place position in making~~
8 ~~the loan disbursements.~~

10 ~~INTERROGATORY NO. 6: If your response to Request for Admission No. 1 is not a~~
11 ~~complete and unqualified admission, please state each and every fact, belief or opinion upon~~
12 ~~which you base your response, and for each such fact provide the relevant date(s) and~~
13 ~~participating individuals.~~

15 ~~ANSWER TO INTERROGATORY NO. 6: Based upon the current state of D.L.~~
16 ~~Evans Bank's document review and the recollections of the Senior Loan Committee members,~~
17 ~~it does not appear a contract for pre-sale of the first townhouse to be built by East Avenue~~
18 ~~Bluff, LLC as a condition of approving its loan to East Avenue Bluff, LLC. D.L. Evans'~~
19 ~~review is ongoing and responses will be supplemented, if appropriate.~~

21 ~~INTERROGATORY NO. 7: If your response to Request for Admission No. 2 is not a~~
22 ~~complete and unqualified admission, please state each and every fact, belief or opinion upon~~
23 ~~which you base your response, and for each such fact provide the relevant date(s) and~~
24 ~~participating individuals.~~

26 D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 6

1 ~~ANSWER TO INTERROGATORY NO. 7: Based upon D.L. Evans Bank's current~~
2 ~~document review, there is no basis for admitting that D.L. Evans Bank knew or should have~~
3 ~~known the terms of the Purchase and Sale Contract between East Avenue Bluff, LLC and~~
4 ~~Leslie Benz, including the payment release provisions and dates prior to closing on its loan to~~
5 ~~East Avenue Bluff, LLC.~~ The senior loan committee was advised of the fact that a sale
6 existed and some of its terms, but the contract itself was not presented to the senior loan
7 committee and the Bank's documentation, to this point of the review, has not established that
8 the contract itself was received by the Bank prior to the closing of the loan. In this regard, the
9 loan officers in the loan are no longer employed by D.L. Evans Bank and D.L. Evans Bank
10 has been attempting, without success, to obtain information from them relating to this
11 transaction.
12

13
14 ~~INTERROGATORY NO. 8: WITNESSES: Please identify, pursuant to paragraph~~
15 ~~A.4., above, each person having knowledge of the facts of this case. Also, for each of those~~
16 ~~identified persons whom you expect to call as a witness at the trial, state the substance of his~~
17 ~~or her expected testimony.~~

18
19 ~~ANSWER TO INTERROGATORY NO. 8: The senior loan committee, comprised of~~
20 ~~Bruce Hunsaker, Scott Horsley, John Evans, Jr., John Evans, Sr., George Gorton, J.V. Evans,~~
21 ~~Jim Lynch, Glen Kuneau, Don Evans and Kevin Smith can be located at PO Box 1188,~~
22 ~~Burley, Idaho 83318. Jim Kino and Ken Nelson still reside in Blaine County, believed to be~~
23 ~~in the Hailey area, an address will be provided when it can be located. The above, as well as~~
24 ~~the plaintiff, and the other named defendants, are persons having knowledge of the facts of~~

25
26 D.L. EVANS BANK'S OBJECTION AND ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES - 7

1 the loan officer and over to a loan analyst that
2 does their analysis of the financial situation of
3 the borrower and the synopsis of the request, and
4 then that's sent back to the loan officer to
5 include that into the presentation as it goes up
6 to the senior loan.

7 Q. So this says "Loan Analyst Addendum."
8 Addendum to what?

9 A. Addendum to the loan presentation.

10 Q. Okay. So it's like an addendum is part
11 of the loan memorandum?

12 A. Yes.

13 Q. And this document, it says, "Borrower,
14 John Rutherford." In July 31st of '07, was he
15 still going to be the borrower, do you know, the
16 very top box?

17 A. Yeah. I believe...

18 Well, I don't have any direct knowledge
19 of this, and I'd only be speculating to know
20 whether or not it initiated with him and then he
21 changed it into a different entity.

22 Q. Okay. The loan analyst is C.J. Weaver.
23 Is she still with D.L. Evans Bank?

24 A. No, she's not.

25 Q. Do you know what happened to her?

1 A. She left quite a while ago, a year,
2 year-and-a-half ago, something like that.

3 Q. Did she resign?

4 A. I couldn't tell you. I am not her
5 supervisor. I don't know what happened.

6 Q. Left over a year ago?

7 A. Yes, I believe it's been over a year.

8 Q. Then the second paragraph under the
9 synopsis...

10 Oh, wait. Back up a second.

11 So this was provided to Ken Nelson,
12 this being Exhibit 9, and then Ken Nelson would
13 bundle it with his package that would be part of
14 the loan memorandum that would be going up to his
15 manager and then regional and then up to senior
16 loan committee because of the amount; correct?

17 A. Yes, correct.

18 Q. Okay. And then the second paragraph
19 says: "Primary source of repayment will be the
20 proceeds from the sale of the home upon its
21 completion. The home has been pre-sold to Leslie
22 Benz for 2.744 million, who has already committed
23 500 million of nonrefundable earnest money to the
24 project with an additional 250 million on or
25 before November 1st."

1 MR. STONE: You mean thousand, don't
2 you?

3 MS. WYGLE: 250,000, yes. We have
4 million a couple places. We have MMs all over
5 the place. Mil on or before.

6 Q. BY MS. WYGLE: So how would the loan
7 analyst know these provisions about the pre-sale?

8 A. Discussion with the loan officer -

9 Q. Okay.

10 A. - in preparing this.

11 Q. How would the loan officer know about
12 the pre-sale?

13 A. From the contract.

14 Q. Okay. So does the inclusion of this
15 paragraph lead you to believe that as of July
16 31st, 2007, D.L. Evans Bank knew the terms of the
17 contract between East Avenue Bluff, LLC and
18 Ms. Benz?

19 A. Well, this is what was presented to us.

20 Q. Okay. So is this the way you would
21 normally find out about a pre-sold construction
22 project, in the loan analyst addendum?

23 A. No, quite often the loan officer is
24 presenting all the facts of the loan presentation
25 that he's trying to present to us. He would

1 include information like that. That's probably
2 where she got this, but I don't know.

3 Q. So there may have been something in the
4 documents that were sent to the analyst which
5 allowed her to have this information to present
6 as part of the package to the senior loan
7 committee?

8 A. Correct.

9 Q. Handing you what has been marked as
10 Deposition Exhibit 10, can you identify that
11 document?

12 A. Yes, this is a copy of the loan
13 memorandum.

14 Q. And is that the loan memorandum that
15 was provided to the senior loan committee in
16 relation to the East Avenue Bluff loan?

17 A. Yes.

18 Q. And who prepared this document?

19 A. This is prepared by the loan officer
20 and his loan assistant.

21 Q. Okay. So officer's name and number,
22 Ken Nelson, number 321. That's indicative of who
23 prepared this entire four-page document?

24 A. Yes.

25 Q. It was provided to the senior loan 80

1. loan from us on that, and at least that's what he
2 remembered. You'd have to ask him.

3 Q. Hadn't there be prior appraisals done
4 on this property?

5 A. Before -- back in '07 there were.

6 Q. Weren't there appraisals done that were
7 presented that were done for Zions Bank and
8 another appraisal of the property that was done
9 for Wells Fargo?

10 A. I am not aware of those.

11 Q. Okay. Do you know whether D.L. Evans
12 Bank notified Ms. Benz prior to disbursing any
13 draw requests?

14 A. I have no knowledge. I don't know
15 that.

16 Q. Another affirmative defense that you've
17 alleged is the affirmative defense of waiver, and
18 that's alleging that Ms. Benz engaged in some
19 conduct or took some actions which waived her
20 right to claim to be in first position ahead of
21 the bank.

22 What I'm asking you is, what conduct
23 did Ms. Benz engage in that made you think that
24 she wouldn't be seeking a first position vendee's
25 lien?

1 A. Truthfully, I never heard of a vendee's
2 lien before we got through into this, but I have
3 no knowledge of anything that you're talking
4 about there exactly.

5 Q. Okay. So there's nothing that Ms. Benz
6 did other than sign the purchase and sale
7 contract that D.L. Evans Bank considered a waiver
8 of her rights or anything.

9 A. I couldn't answer that. I don't know.

10 Q. So you don't know of anything that she
11 might have told Ken Nelson that he relayed to you
12 or that anybody considered.

13 A. I'm not aware of any stuff like that.

14 Q. Do you think Miss Benz has done
15 anything wrong or culpable in this whole mess?

16 A. How do you answer that? I really don't
17 have an opinion on this, because I'm just trying
18 to go through and -- you know, go through with
19 this. And so I've never met Mrs. Benz, and to my
20 knowledge, I don't believe I've ever talked to
21 her, so I couldn't tell you what she knew or
22 didn't know or what -- you know, whether she had
23 done anything like that.

24 Q. In the six years you've been on the
25 senior loan committee, has the senior loan

1 committee ever discussed the statutory basis or a
2 vendee's lien, statutory 45-804, or a vendee's
3 lien?

4 A. As far as the -- I haven't been on the
5 senior loan for the six years, it's been probably
6 about four or so.

7 Q. Oh, correct.

8 A. But I am not -- I do not remember any
9 other time other than when we started this that
10 this was a discussion on that statute.

11 Q. In your answer to interrogatories,
12 number seven, the answer states, "Based upon D.L.
13 Evans Bank's current document review, there is no
14 basis for admitting that D.L. Evans Bank knew or
15 should have known the terms of the purchase and
16 sale contract between East Avenue Bluff, LLC and
17 Leslie Benz, including the payment release
18 provisions and dates prior to closing on its loan
19 to East Avenue Bluff, LLC."

20 Now, you signed those documents
21 November 17th, 2009. Is that still your opinion?

22 A. I believe the statement we were talking
23 about, senior loan, you know, was advised that
24 the sale existed and some terms, but the contract
25 itself, senior loan didn't ever look at the

1 contract, and then I got it later, I looked at it
2 later.

3 Q. Do you believe that Ken Nelson's
4 knowledge of those documents didn't put D.L.
5 Evans Bank on notice?

6 A. I'm not sure what Ken Nelson's
7 knowledge was, other than what he put on the loan
8 memorandum.

9 Q. Okay.

10 A. So I don't know.

11 Q. As we sit here today, other than
12 yourself, who do you expect to have testify at
13 the trial in this matter?

14 A. I'm not sure. We've got probably --
15 you know, Ken Nelson is probably going to be one,
16 and Jim Kino, I'm not sure of. I'm trying to
17 identify the people that were most involved with
18 it. I'm not sure who we listed on our witness
19 list.

20 Q. You listed everybody on the senior loan
21 committee.

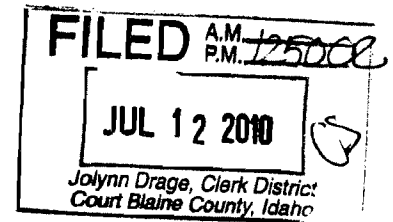
22 A. Okay. They could.

23 Q. Are you currently -- are their
24 testimonies going to be unique, or did they all
25 attend the same meeting and --

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB# 2232

Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
liability company; D.L. EVANS BANK;
TIMELESS DESIGN COMPANY; CLIFF R.
IVERSON dba LEI'S CUSTOM TILE; FISHER
APPLIANCE, INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.; BUCKHORN
ELECTRIC, LLC/DEVILAN HAIRE; A.C.
HOUSTON LUMBER COMPANY; MIKE
PUNNETT; PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND ELECTRIC;
FERGUSON ENTERPRISES, INC.; ROCKY
MOUNTAIN HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC; WHITE
BUILDERS, LLC; MIKE'S WELDING AND
METAL WORKS, LLC; SENTINEL FIRE &
SECURITY, INC.; STEVE McCOY, dba
McCOY'S PAINTING; CHRISTOPHER
BRENNAN dba BRENNAN'S CARPET; and
PAUL COOPER dba SUN VALLEY DRYWALL,

Defendants.

Case No. CV-2009-613

ORDER ON APPLICATION FOR
COSTS AND ON OBJECTIONS
TO ATTORNEY'S FEES AND
INTEREST

ORDER ON APPLICATION FOR COSTS AND ON OBJECTIONS TO
ATTORNEY'S FEES AND INTEREST/1

THIS MATTER came on for hearing on the 29th day of June, 2010, upon the Plaintiff's Application for Costs, including attorney's fees, against the remaining Defendant in this case, D. L. Evans Bank (hereinafter referred to as "the Bank") and the Bank's Objection to Interest. Plaintiff was not present but was represented by Janet Wygle of Luboviski, Wygle, Fallowfield & Ritzau, P.A., and the Bank was not present but was represented by R.C. Stone of Parsons, Smith, Stone, Loveland & Shirley, LLP. The Court announced that it had read the briefs filed in support of and in opposition to such motions. The Court, having heard argument of counsel for both parties, recited its findings and conclusions on the record on June 29, 2010, including the following:

1. The Plaintiff was the prevailing party and is entitled to recover her Costs of Right pursuant to I.R.C.P., Rule 54(d)(1)(C), in the sum of One Thousand Seventy-Five and 05/100 Dollars (\$1,075.05), which amount shall be added to her Vendee's Lien amount. The Defendant, the Bank, did not object to any of such costs.

2. The Plaintiff is entitled to recover her Discretionary Costs pursuant to I.R.C.P., Rule 54(d)(1)(D), in the sum of Six Hundred Twenty and 22/100 Dollars (\$620.22), which amount shall be added to her Vendee's Lien amount. The Defendant, the Bank, did not object to any of such costs. The Court found that such costs were necessary and exceptional costs reasonably incurred, and should in the interests of justice be assessed against the adverse party.

3. Interest on a vendee's deposit is an element of damages, to be added to the lien amount. The appropriate date from which prejudgment interest should run is the date of default by East Avenue Bluff, LLC, because that was the date on which East Avenue

Bluff, LLC, breached the contract and the money became refundable to the Plaintiff under the terms of the contract. This is a different situation than in *McMahon v. Cooper*, 70 Idaho 39, 212 P.2d 657 (1949) and the other cases cited by the Bank, which mention the date of rescission as a significant date, because in those cases the purchase and sale transaction had closed, the buyer had taken possession, and then a condition arose which entitled the buyer to rescind the transaction. In those types of cases, the date of rescission is the first notice the Seller had of a claimed breach, which is not the case here. In the present case, interest on the Plaintiff's deposits should accrue at 12% per annum (the legal rate of interest for money due, pursuant to Idaho Code §28-22-104(1)) from February 6, 2009, which was the closing date for the sale and purchase transaction between East Avenue Bluff, LLC, and the Plaintiff, until May 3, 2010. The Plaintiff's Vendee's Lien amount is therefore increased by the accrued interest of \$111,207.58.

4. Attorney's fees are not recoverable in a Vendee's Lien action. Therefore, no attorney's fees are awarded to the Plaintiff under Idaho Code §45-804.

5. Attorney's fees are only recoverable under Idaho Code §12-120(3) to a prevailing party in a commercial transaction. The Plaintiff's action was not such a commercial transaction and, therefore, no attorney's fees are awarded to the Plaintiff under Idaho Code §12-120(3).

6. Attorney's fees may be awarded under Idaho Code §12-121 only if the Court finds that the Defendant defended the case frivolously, unreasonably or without foundation. The Court cannot find that the Bank's defenses or claims were frivolous in their entirety, and, therefore, no attorney's fees are awarded to the Plaintiff under Idaho

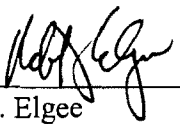
Code §12-121.

7. Regarding the Plaintiff's request for attorney's fees against the Bank under I.R.C.P., Rule 37(c), the court finds that such a request should be made in a separate motion and grants the Plaintiff a reasonable amount of additional time to file a separate motion seeking attorney's fees against the Bank under such rule. The court finds that the word "proves" in such rule allows the proof to be made in a Summary Judgment motion, and not only at a trial as contended by the Bank's attorney.

Based upon the foregoing,

IT IS HEREBY ORDERED that Plaintiff is awarded her costs of right in the sum of \$1,075.05, and her discretionary costs in the sum of \$620.22, plus pre-judgment interest at the rate of twelve percent (12%) per annum from February 6, 2009, in the amount of \$111,207.58, for a total Vendee's Lien amount of \$862,902.85, which lien has priority over the deed of trust lien of Defendant D. L. Evans Bank. This total judgment amount shall accrue interest at the legal rate for judgments of 5.625% per annum from May 3, 2010 until paid in full.

DATED this 12 day of July, 2010.



Robert J. Elgee
Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of July, 2010, I served a true and correct copy of the within and foregoing document upon the attorneys named below in the manner noted:

Janet C. Wygle
LUBOVISKI, WYGLE, FALLOWFIELD & RITZAU, P.A.
P.O. Box 1172
Ketchum, Idaho 83340

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318

☒ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.

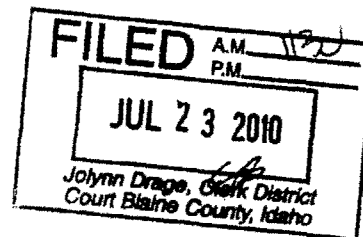
☐ By hand delivering copies of the same to the offices of the attorney.

☐ By transmitting copies of the same to said attorney by facsimile machine process.


Clerk of the District Court

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB No. 2232



Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company; D.L. EVANS BANK;
 TIMELESS DESIGN COMPANY; CLIFF R.
 IVERSON dba LEI'S CUSTOM TILE; FISHER
 APPLIANCE, INC.; VIEWPOINT, INC.; CAD
 DRAFTING SYSTEMS, INC.; BUCKHORN
 ELECTRIC, LLC/DEVILAN HAIRE; A.C.
 HOUSTON LUMBER COMPANY; MIKE
 PUNNETT; PRECISION PLUMBING, INC.;
 WATSON BUILDERS, INC.; HARRIS
 REFRIGERATION HEATING AND ELECTRIC;
 FERGUSON ENTERPRISES, INC.; ROCKY
 MOUNTAIN HARDWARE, INC.; SWEET'S
 PORTABLE WASTE SERVICES, LLC; WHITE
 BUILDERS, LLC; MIKE'S WELDING AND
 METAL WORKS, LLC; SENTINEL FIRE &
 SECURITY, INC.; STEVE McCOY, dba
 McCOY'S PAINTING; CHRISTOPHER
 BRENNAN dba BRENNAN'S CARPET; and
 PAUL COOPER dba SUN VALLEY DRYWALL.

Defendants.

Case No. CV-2009-613

BRIEF IN SUPPORT OF
 MOTION FOR ATTORNEY'S
 FEES PURSUANT TO I.R.C.P.
 RULE 37(c)

BRIEF IN SUPPORT OF MOTION FOR ATTORNEY'S FEES
 PURSUANT TO I.R.C.P. RULE 37(c)/1

The Plaintiff is seeking an award of attorney's fees for having to prove a fact on Summary Judgment which the Defendant, D.L. Evans Bank, denied was true in Plaintiff's Request for Admission. The fact in dispute was the Bank's knowledge of the terms of the Plaintiff's contract with East Avenue Bluff, LLC, prior to the Bank making its loan to East Avenue Bluff, LLC, which fact was crucial to the *bona fide lender* status of the Bank and was determinative of the priority given to the Bank's secured loan *vis-a-vis* the Plaintiff's Vendee's Lien. The importance of a subsequent lender's notice of the potential lien was made manifest in *McMahon v. Cooper*, 70 Idaho 139, 212 P.2d 657 (1949). *See also, Shepherd v. Dougan*, 58 Idaho 543, 76 P.2d 442 (1937)(actual notice affects priority).

The issue regarding the Bank's advance knowledge of the terms of Ms. Benz's purchase contract initially arose in the Bank's Answer to the Complaint. The Plaintiff's allegations regarding the Bank's knowledge were as follows:

XXVII

On November 13, 2007, Plaintiff paid the sum of \$250,000.00 to Defendant as additional earnest money for the above-referenced purchase, as required by the Agreement. A true and correct copy of Plaintiff's personal check is attached hereto as Exhibit E and incorporated herein by this reference. These funds were released to Defendant EAB LLC pursuant to the terms of the Agreement.

* * *

XXX

Prior to lending the Defendant any money, D.L. Evans Bank required a copy of the Agreement and was informed that the Plaintiff had allowed or would be allowing the release of all of the earnest money totaling \$750,000.00. Defendant D.L. Evans Bank has acknowledged in writing that the Plaintiff's vendee's lien is superior to its mortgage lien.

The Bank's Answer to paragraph XXVII, filed August 25, 2009, was "... admits that on November 13, 2007, Plaintiff paid the sum of \$250,000.00 to defendant, but denies the remainder of the allegations of that paragraph." The Bank's Answer also denied the allegations contained

in paragraph XXX. The Bank's Answer also alleged three (3) Affirmative Defenses: laches, unclean hands, and waiver on the part of the Plaintiff. Thus, the issue of the extent of the Bank's knowledge, and hence, notice, arose.

The next time the "notice" issue was addressed was in the Plaintiff's Requests for Admission and Interrogatories to the Bank, served on September 2, 2009. The Plaintiff's Request for Admission No. 2 was as follows:

REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or should have known, the terms of the purchase and sale contract between East Avenue Bluff LLC and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff LLC.

The Bank responded on September 11, 2009 with the word "Deny."

The Bank finally answered the Plaintiff's Interrogatories dealing with the notice issue on November 13, 2009. Those interrogatories and the Bank's answers are attached as Exhibit B to the Affidavit of Janet C. Wygle filed in support of this motion for fees. In particular, the Plaintiff points out that the Bank's Answer to Interrogatory No. 7, includes the words "there is no basis for admitting that D.L. Evans Bank knew or should have known the terms of the Purchase and Sale Contract between East Avenue Bluff, LLC and Leslie Benz." It should be noted that the Bank specifically reserved the right to supplement the response because discovery was ongoing at the time. The response was never supplemented or retracted. Clearly, the issue was still disputed.

On February 1, 2010, the Plaintiff took the deposition of Bruce Hunsaker, who was the person who had prepared the Answers to Interrogatories and listed as the Bank's agent. During that deposition, Mr. Hunsaker was asked if that denial of knowledge/notice was still the Bank's position, and his response was far less than an admission of the Bank's knowledge. The Bank

seemed to keep saying that if the Senior Loan Committee didn't have actual knowledge of the contract's terms, then "the Bank" didn't have such knowledge. But the Bank DID have the contract in its files; DID contact Ms. Benz's broker for personal credit information; and DID have the information necessary for it to protect itself prior to making the loan to East Avenue Bluff, LLC.

Shortly after that deposition, the Plaintiff prepared and filed her Motion for Summary Judgment. In the Bank's Brief in Opposition to Motion for Summary Judgment, the Bank still argued that it didn't have the requisite knowledge of the Plaintiff's contract with East Avenue Bluff, LLC to be subordinated to the Plaintiff's Vendee's Lien. The Bank's brief still argues that "priority of a vendee's lien requires a recording and the priority is base[d] on the recording date" (see page 8 of the Bank's brief). The Bank's knowledge of the terms of the contract was still contested at the time of the Summary Judgment hearing and this Court made an actual finding that the Bank had actual notice for purposes of a Vendee's Lien.

The Bank is now arguing that it admitted the Bank had actual knowledge prior to the Plaintiff's Summary Judgment motion and that, therefore, the Plaintiff did NOT have to prove the existence of that fact. This assertion disregards the history of the case as shown through the pleadings and discovery.

"The intended purpose of I.R.C.P. 37(c) is to compensate parties for the expense of unnecessarily proving requested admissions." *Tomich v. City of Pocatello*, 127 Idaho 394, 400, 901 P.2d 501 (1995). Instead of the Bank going through its files and finding the contract between East Avenue Bluff LLC and the Plaintiff, and admitting such knowledge, the Bank chose to deny the fact and have the Plaintiff's attorney and paralegal review thousands of pages of documents looking for something that would prove the Bank knew that Ms. Benz's purchase

money was being released to East Avenue Bluff LLC. That extensive discovery did produce both a copy of the contract and the Senior Loan Committee memorandum which recited most of the material terms of the contract, which documents proved the Bank's actual notice of the Plaintiff's claim. However, the Plaintiff had to incur a tremendous amount of legal fees to prove that fact at summary judgment.

In *Payne v. Wallace* 136 Idaho 303, 32 P.3d 695 (Ct.App. 2001), an automobile accident case, the Defendant denied his own negligence and the Plaintiff's non-negligence in his response to two Requests for Admission. The day before trial, the Defendant admitted negligence and liability. The Court of Appeals denied a Rule 37(c) attorney's fees request by the Plaintiff because the Plaintiff had not had to PROVE the fact at trial. However, the Court made clear that there were other ways available under the rules to sanction such a belated admission of a fact previously denied, and there was a clear message that responses to Requests for Admissions are taken seriously and can be the basis for an award of attorney's fees.

In *Desfosses v. Desfosses*, 122 Idaho 634, 836 P.2d 1095 (Ct.App. 1992), a divorced wife sued her former husband to prove his ownership of assets in order to satisfy a monetary award against him. The former husband denied his ownership of a certain asset; however, the wife proved his ownership in a summary judgment proceeding. The trial court thereafter awarded the wife attorney's fees pursuant to Idaho Rules of Civil Procedure, Rule 37(c). On appeal, the Court of Appeals upheld the award because a failure to admit a fact's truth when requested in discovery amounts to "discovery abuse." The *Desfosses* case supports the Plaintiff's position that "proof" as required by Rule 37(c) can be made in a summary judgment proceeding. It also stands for the position that the failure to admit a fact the truth of which is known or could be known by a party, supports an award of attorney's fees to the requesting party.

BRIEF IN SUPPORT OF MOTION FOR ATTORNEY'S FEES
PURSUANT TO I.R.C.P. RULE 37(c)/5

An award of attorney's fees is mandatory in a case where a party fails to admit the truth of a matter as requested, unless such party proves that one of the Rule's four exceptions apply.

Ruge v. Posey, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988). The *Ruge* case also holds that a court cannot deny reasonable expenses of proving a denied fact just because such expenses may also have been incurred with respect to another issue in the case.

Moreover, there must be a good reason for denying a Request for Admission, and such good reason must be presented by the party opposing the award of attorney's fees under Rule 37(c). *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 766 P.2d 751 (1988). In the present case, the Bank simply failed to review its loan files and "shadow" files adequately at any time prior to the Plaintiff's Motion for Summary Judgment. The Bank has offered no justification for its denial that it knew or should have known the contents and terms of the Plaintiff's purchase contract prior to funding its loan.

Based on the facts of this case and the above Idaho cases supporting such an award, this Court should award the Plaintiff her expenses incurred in proving the main issue in this case dealing with priority of a Vendee's Lien, i.e., the Bank's knowledge.

DATED this 22nd day of July, 2010.

LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

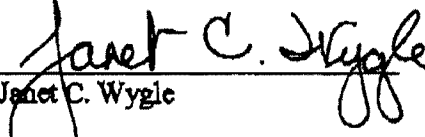
By Janet C. Wygle
Janet C. Wygle
Attorney for Plaintiff

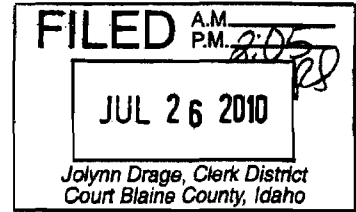
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2010, I served a true and correct copy of the within and foregoing document upon the attorney named below in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

- ☐ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.
- ☐ By hand delivering copies of the same to the offices of the attorney.
- ☒ By transmitting copies of the same to said attorney by facsimile machine process.


Janet C. Wygle



PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP
LAWYERS
BURLEY, IDAHO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318
(208) 878-8382 - Phone
(208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,	)	Case No. <u>CV-2009-613</u>
)	
Plaintiff,)	
)	
vs.	)	AFFIDAVIT OF R.C. STONE
	)	IN OPPOSITION TO
EAST AVENUE BLUFF, LLC, an Idaho	)	IRCP 37(c) MOTION
limited liability company; D.L. EVANS)	
BANK; TIMELESS DESIGN COMPANY;)	
CLIFF R. IVERSON d.b.a. LEI'S)	
CUSTOM TILE; FISHER APPLIANCE,)	
INC.; VIEWPOINT, INC.; CAD)	
DRAFTING SYSTEMS, INC.;)	
BUCKHORN ELECTRIC, LLC/DEVILAN)	

AFFIDAVIT OF R.C. STONE
IN OPPOSITION TO
IRCP 37(c) MOTION - 1

1 HAIRE; A.C. HOUSTON LUMBER)
2 COMPANY; MIKE PUNNETT;)
3 PRECISION PLUMBING, INC.;)
4 WATSON BUILDERS, INC.; HARRIS)
5 REFRIGERATION HEATING AND)
6 ELECTRIC; FERGUSON ENTERPRISES,)
7 INC.; ROCKY MOUNTAIN)
8 HARDWARE, INC.; SWEET'S)
9 PORTABLE WASTE SERVICES, LLC;)
10 WHITE BUILDERS, LLC; MIKE'S)
11 WELDING AND METAL WORKS, LLC;)
12 SENTINEL FIRE & SECURITY, INC.;)
13 STEVE McCOY, d.b.a. McCOY'S)
14 PAINTING; CHRISTOPHER BRENNAN)
15 d.b.a. BRENNAN'S CARPET; and)
16 PAUL COOPER d.b.a. SUN VALLEY)
17 DRYWALL,)
18 Defendants.)

13 STATE OF IDAHO)
14)ss
15 County of Cassia)

16 R.C. Stone, having been first duly sworn deposes and states:

17 1. I am one of the attorneys for D.L. Evans Bank, the Defendant in the above-
18 entitled action.

19 2. Attached hereto as Exhibit A are the original discovery requests submitted by
20 the Plaintiff which include both Request for Admission No. 2 and Interrogatory No. 7.

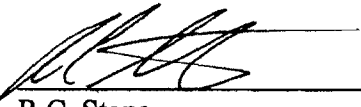
21 3. D.L. Evans Bank made two responses to Plaintiff's request for production. The
22 first was on October 23, 2009, which included the contents of D.L. Evans Bank's formal loan
23 file. A second major production of all of the shadow files maintained by various offices in the
24

25 AFFIDAVIT OF R.C. STONE
26 IN OPPOSITION TO
IRCP 37(c) MOTION - 2

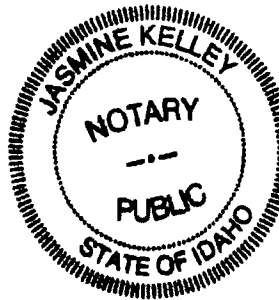
bank was made on the 17th day of February, 2010. This production included the purchase and sale agreement between Benz and East Avenue Bluff, LLC, which was included in the loan officer's shadow file and Exhibit 10 to the deposition of Bruce Hunsaker which Wygle attached to her affidavit in support of her motion for summary judgment.

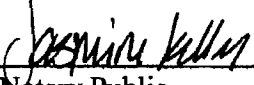
4. The deposition of Bruce Hunsaker consists of one hundred and thirty pages of testimony.

DATED this 23 day of July, 2010.


R.C. Stone

Subscribed and sworn before me this 23rd day of July, 2010.




Notary Public
Residing at: Albion
My Commission Expires: 24 Sept 2013

AFFIDAVIT OF R.C. STONE
IN OPPOSITION TO
IRCP 37(c) MOTION - 3

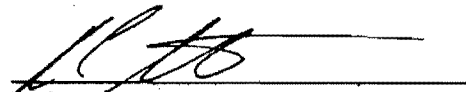
CERTIFICATE OF DELIVERY

I hereby certify that on the 23 day of July, 2010, I served a copy of the foregoing AFFIDAVIT OF R.C. STONE IN OPPOSITION TO IRCP 37(c) MOTION upon the following named person(s) in the manner listed below:

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

PARSONS, SMITH & STONE, LLP



R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318

AFFIDAVIT OF R.C. STONE
IN OPPOSITION TO
IRCP 37(c) MOTION - 4

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB# 2232
Attorneys for Plaintiff

RECEIVED
SEP 03 2009

Parsons, Smith & Stone, L.L.C.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
liability company; D.L. EVANS BANK;
TIMELESS DESIGN COMPANY; CLIFF R.
IVERSON dba LEI'S CUSTOM TILE; FISHER
APPLIANCE, INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.; BUCKHORN
ELECTRIC, LLC/DEVILAN HAIRE; A.C.
HOUSTON LUMBER COMPANY; MIKE
PUNNETT; PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND ELECTRIC;
FERGUSON ENTERPRISES, INC.; ROCKY
MOUNTAIN HARDWARE, INC.; SWEET'S
PORTABLE WASTE SERVICES, LLC; WHITE
BUILDERS, LLC; MIKE'S WELDING AND
METAL WORKS, LLC; SENTINEL FIRE &
SECURITY, INC.; STEVE McCOY, dba
McCOY'S PAINTING; CHRISTOPHER
BRENNAN dba BRENNAN'S CARPET; and
PAUL COOPER dba SUN VALLEY DRYWALL,

Defendants.

Case No. CV-2009-613

PLAINTIFF'S FIRST
INTERROGATORIES AND
REQUESTS FOR ADMISSION
AND REQUESTS FOR
PRODUCTION OF DOCUMENTS
TO DEFENDANT D.L. EVANS
BANK

PLAINTIFF'S FIRST INTERROGATORIES, REQUESTS FOR ADMISSION, AND
REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT D.L. EVANS BANK /1

EXHIBIT 98A

YOU WILL PLEASE TAKE NOTICE that the Defendant requires that you answer under oath the following interrogatories and requests for admission and produce for inspection and copying the below-designated documents, and serve such answers and responses on Plaintiff's attorney within thirty (30) days from date of service hereof, pursuant to Rules 33(a), 34(a), and 36(a) of the Idaho Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

A. The following terms, words, and phrases shall have the following meanings in this discovery pleading:

1. The term "you" or "your" refers to D.L.EVANS BANK, and all its agents, employees, representatives (including insurers), investigators, consultants, and attorneys.
2. The term "document" shall mean any kind of written, printed, typed, graphic, electronic or photographic matter of any kind or nature, however produced or reproduced, and all mechanical and electronic sound recordings and written transcripts thereof, however produced or reproduced, whether in your control or not, and including without limitation, originals, all file copies, all other copies no matter how or by whom prepared, and all drafts of such documents whether used or not.
3. The term "identify" when used with respect to a document, or the description or identification of a document, shall be deemed to request the nature and subject matter of the document; the date thereof; the title or name thereof; the name, address, and job title or job capacity of the person who prepared it or who has knowledge of it; and the name, address, and job title or job capacity of the recipient thereof.
4. The term "identify" when used with respect to a person shall be deemed to

request the name, phone number, residence address, work address, and relationship to the party to whom this discovery request is directed.

5. The term "relate" shall mean concern, touch on, related to, pertain to, in connection with, or relevant to, pertinent to, apply to, bearing upon, affect, and have to do with. The term "all" shall mean "any and all." The term "and" shall include "or" and "and/or."

B. The document requests are intended to cover all documents either in your possession, under your control, within your dominion or available to you regardless of whether the document is possessed by you or possessed by your agents, attorneys, servants, employees, independent contractors, representatives, insurers, or others from whom you are capable of delivering the documents.

C. If, after exercising due diligence to secure the requested documents, you are unable to produce them, so state, and identify the reason for your inability to produce the documents, the whereabouts of the documents if not in your control or possession, and the means whereby you lost control or possession of the documents. Identify any documents which once did exist, if not now existing, and state any information or knowledge you have concerning the information contained in those documents.

D. With respect to any documents called for by these requests but withheld due to any claim of privilege, list for each such document:

1. The paragraph to which the document is otherwise responsive;
2. Its title and general subject matter;
3. Its date;
4. The name(s) and title(s) of its author(s) or preparer(s);

5. The name(s) and title(s) of the person(s) for whom it was prepared and all persons to whom it was sent or shown; and

6. The nature of the privilege claimed.

E. The documents produced shall be made available in such a manner as to indicate clearly which documents are being produced in response to each request. Each discovery request shall be accorded a separate response and each subpart of a request shall be accorded a separate response.

F. Where knowledge or information in possession of a party is requested, such request includes information and knowledge either in your possession, under your control, within your dominion, or available to you regardless of whether this information is in your personal possession or is possessed by your agents, attorneys, servants, employees, independent contractors, representatives, insurers or others with whom you have a relationship and from whom you are capable of delivering information, documents or material.

G. Should any objection be raised to any Interrogatory or Request for Production, the objection shall be stated in full along with the reasons therefor.

H. These discovery requests are continuing in nature, so as to require you to file supplementary answers and/or responses in a reasonable manner if you obtain further or different information before trial.

I. Copies will be made at the expense of the Defendant and the documents will be promptly returned to the Plaintiff's attorney after copying has been completed. **Documents which are responsive to any request and which exist in electronic or data storage devices in any medium are included in this Request for Production of Documents and such**

documents are requested to be produced as printed documents or as PDF files transferred onto a removable CD-R storage disk and delivered to Plaintiff's attorney.

INTERROGATORIES AND REQUESTS FOR ADMISSION

INTERROGATORY NO. 1: State the name(s) and position(s) of employment of the person(s) answering this discovery request on behalf of D.L. Evans Bank.

INTERROGATORY NO. 2: Please state each and every fact, belief or opinion upon which you base your denial of the allegations contained in paragraphs XXVII -XXXIII of Count One of Plaintiff's Complaint, and for each such fact provide the relevant date(s) and participating individuals.

INTERROGATORY NO. 3: Please state each and every fact, belief or opinion upon which you base your First Affirmative Defense that the Plaintiff is guilty of laches, and for each such fact provide the relevant date(s) and participating individuals.

INTERROGATORY NO. 4: Please state each and every fact, belief or opinion upon which you base your Second Affirmative Defense that the Plaintiff has unclean hands, and for each such fact provide the relevant date(s) and participating individuals.

INTERROGATORY NO. 5: Please state each and every fact, belief or opinion upon which you base your Third Affirmative Defense that the Plaintiff waived her priority, and for each such fact provide the relevant date(s) and participating individuals.

REQUEST FOR ADMISSION NO. 1: Admit that D.L. Evans Bank required a contract for the pre-sale of the first townhouse to be built by East Avenue Bluff LLC as a condition of approving your loan to East Avenue Bluff LLC.

INTERROGATORY NO. 6: If your response to Request for Admission No. 1 is not a complete and unqualified admission, please state each and every fact, belief or opinion upon which you base your response, and for each such fact provide the relevant date(s) and participating individuals.

REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or should have known, the terms of the purchase and sale contract between East Avenue Bluff LLC and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff LLC.

INTERROGATORY NO. 7: If your response to Request for Admission No. 2 is not a complete and unqualified admission, please state each and every fact, belief or opinion upon which you base your response, and for each such fact provide the relevant date(s) and participating individuals.

INTERROGATORY NO. 8: WITNESSES: Please identify, pursuant to paragraph A.4., above, each person having knowledge of the facts of this case. Also, for each of those identified persons whom you expect to call as a witness at the trial, state the substance of his or her expected testimony.

INTERROGATORY NO. 9: EXHIBITS: Please identify, pursuant to paragraph A.3., above, each and every document that you intend to offer as evidence at the trial of this action, and provide a summary of the facts, statements or opinions contained in any such document. In lieu of answering this Interrogatory, you may attach legible and readable copies of such documents to your answer hereto.

INTERROGATORY NO. 10: EXPERT WITNESSES: Please identify, pursuant to

paragraph A.4., above, every expert witness whom you intend to call in the trial of this action, and for each such expert witness state the subject matter and the substance of the facts and opinions to which he/she is expected to testify.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: All documents constituting your complete "loan file" for your loan to East Avenue Bluff LLC and/or Jack and Stacey Rutherford in the original amount of \$2,650,000, specifically including all proposals and application documents, all correspondence including e-mails, all requests for documents directed to the borrower, all instructions regarding contingencies, all notes, any preliminary loan approvals, any minutes of loan committee meetings during which the loan to East Avenue Bluff LLC was discussed or approved, and other documents used, considered or relied upon by you in making the loan to East Avenue Bluff LLC.

REQUEST FOR PRODUCTION NO. 2: All documents related to Ms. Benz's alleged laches, unclean hands, and waiver of priority as alleged in your Affirmative Defenses.

REQUEST FOR PRODUCTION NO. 3: All documents you referred to or utilized in preparing your Answers to these Interrogatories, Requests for Admission, and Requests for Production of Documents.

REQUEST FOR PRODUCTION NO. 4: All documents or other items you intend to offer into evidence at the trial in this matter.

///

///

///

DATED this 2nd day of September, 2009.

LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.

By Janet C. Wygle
Janet C. Wygle
Attorneys for Plaintiff

PLAINTIFF'S FIRST INTERROGATORIES, REQUESTS FOR ADMISSION, AND
REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT D.L. EVANS BANK /8

EXHIBIT A

EXHIBIT A

CERTIFICATE OF SERVICE

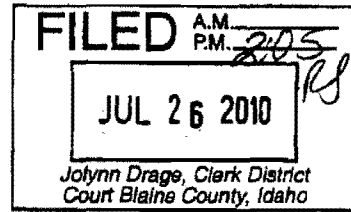
I HEREBY CERTIFY that on the 2nd day of September, 2009, I served a true and correct copy of the within and foregoing document upon the attorney named below in the manner noted:

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318
FAX: 208-878-0146

- ☒ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.
- ☐ By hand delivering copies of the same.
- ☐ By transmitting copies of the same to said attorneys by facsimile machine process.

LUBOVISKI, WYGLE, FALLOWFIELD
& RITZAU, P.A.

By Janet C. Wygle
Janet C. Wygle



PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP
LAWYERS
BURLEY, IDAHO

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318
(208) 878-8382 - Phone
(208) 878-0146 - Fax
Idaho State Bar #1890
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

Plaintiff,

vs.

EAST AVENUE BLUFF, LLC, an Idaho
limited liability company; D.L. EVANS
BANK; TIMELESS DESIGN COMPANY;
CLIFF R. IVERSON d.b.a. LEI'S
CUSTOM TILE; FISHER APPLIANCE,
INC.; VIEWPOINT, INC.; CAD
DRAFTING SYSTEMS, INC.;
BUCKHORN ELECTRIC, LLC/DEVILAN
HAIRE; A.C. HOUSTON LUMBER
COMPANY; MIKE PUNNETT;
PRECISION PLUMBING, INC.;
WATSON BUILDERS, INC.; HARRIS
REFRIGERATION HEATING AND
ELECTRIC; FERGUSON ENTERPRISES,
INC.; ROCKY MOUNTAIN
HARDWARE, INC.; SWEET'S

Case No. CV-2009-613

MEMORANDUM IN OPPOSITION
TO IRCP 37(c) MOTION

1 PORTABLE WASTE SERVICES, LLC;)
2 WHITE BUILDERS, LLC; MIKE'S)
3 WELDING AND METAL WORKS, LLC;)
4 SENTINEL FIRE & SECURITY, INC.;)
5 STEVE McCOY, d.b.a. McCOY'S)
6 PAINTING; CHRISTOPHER BRENNAN)
7 d.b.a. BRENNAN'S CARPET; and)
8 PAUL COOPER d.b.a. SUN VALLEY)
9 DRYWALL,)
10 Defendants.)

11 I.

12 Lack of Jurisdiction.

13 Final judgment has entered in this action. A Notice of Appeal has been filed with the
14 Idaho Supreme Court. Idaho Appellate Rule 13(b) provides the retained powers of the District
15 Court following appeal. Under that rule the District Court does not retain the power to
16 consider or resolve an IRCP 37(c) Motion.

17 II.

18 Request for Admission No.2 Was and Is Properly Denied.

19 Request for Admission No. 2 reads as follows:

20 "REQUEST FOR ADMISSION NO. 2: Admit that D.L. Evans Bank knew, or
21 should have known, the terms of the purchase and sale contract between East
22 Avenue Bluff LLC and Leslie Benz, including the payment release provisions
23 and dates, prior to closing on its loan to East Avenue Bluff LLC."

24 The request for admission has two provisions which require denial. It asks for
25 admission of a state of knowledge prior to closing on its loan to East Avenue Bluff, LLC.
26 D.L. Evans' investigation of its file confirmed that a copy of the contract was in one of
the loan officer's shadow files but there is no record that it was received prior to D.L.
Evans closing its loan to East Avenue Bluff, LLC. D.L. Evans was and is unable to
determine when it was received and placed in the file. D.L. Evans was able to determine

1 that the contract was not presented to the senior loan committee, who discussed the Benz
2 transaction and some of its terms. The request for admission also does not limit itself to
3 less than all of the terms of the purchase and sale contract. While D.L. Evans Bank's
4 records establish that it was aware of some of the terms prior to closing, as demonstrated
5 by the records from the Senior Loan Committee which were produced in discovery, it
6 could not establish that it had information of all of the terms of the purchase and sale
7 contract. IRCP 36(a) requires that a denial shall fairly meet the substance of the requested
8 admission. The Plaintiff immediately followed Request for Admission No. 2 with

9 Interrogatory No. 7 which asked:

10
11 "INTERROGATORY NO. 7: If your response to Request for Admission No. 2 is
12 not a complete and unqualified admission, please state each and every fact, belief
13 or opinion upon which you base your response, and for each such fact provide
14 the relevant date(s) and participating individuals."

15 The defendant believed that the response to this interrogatory met the
16 requirements of Rule 36(a) for qualifying its answer and, D.L. Evans Banks' response to
17 Interrogatory No. 7 is as follows:

18 "ANSWER TO INTERROGATORY NO. 7: Based upon D.L. Evans Bank's
19 current document review, there is no basis for admitting that D.L. Evans Bank
20 knew or should have known the terms of the Purchase and Sale Contract between
21 East Avenue Bluff, LLC and Leslie Benz, including the payment release
22 provisions and dates prior to closing on its loan to East Avenue Bluff, LLC. The
23 senior loan committee was advised of the fact that a sale existed and some of its
24 terms, but the contract itself was not presented to the senior loan committee and
25 the Bank's documentation, to this point of the review, has not established that the
26 contract itself was received by the Bank prior to the closing of the loan. In this
regard, the loan officers in the loan are no longer employed by D.L. Evans Bank
and D.L. Evans Bank has been attempting, without success, to obtain information
from them relating to this transaction."

1 D.L. Evans Bank stands by its denial of Request for Admission No. 2 and its
2 Response to Interrogatory No. 7 which accurately reflect the state of D.L. Evans Bank's
3 file and knowledge.
4

5 III.
6 IRCP 37(c)

7 IRCP 37 (c) provides that:

8 "If a party fails to admit the genuineness of any document or the truth of any
9 matter as requested under Rule 36, and if the party requesting the admissions
10 thereafter proves the genuineness of the document or the truth of the matter, the
11 requesting party may apply to the court for an order requiring the other party to
12 pay the reasonable expenses incurred in making that proof, including reasonable
13 attorney's fees. The court shall make the order unless it finds that (1) the request
14 was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of
15 no substantial importance, or (3) the party failing to admit had reasonable ground
16 to believe that the party might prevail on the matter, or (4) there was other good
17 reason for the failure to admit."

18 Ms. Benz did not "prove" that D.L. Evans Bank "knew, or should have known,
19 the terms of the purchase and sale contract between East Avenue Bluff, LLC and Leslie
20 Benz, including the payment release provisions and dates, prior to closing on its loan to
21 East Avenue Bluff, LLC." In a summary judgment facts are established by an affidavit.
22 In this case the only affidavit supporting the motion for summary judgment was that of
23 Janet C. Wygle dated the 2nd day of April, 2010. The affidavit establishes a series of
24 excerpts from the depositions of Leslie Benz and Bruce Hunsaker together with exhibits
25 to the depositions. The only reference to D.L. Evans Bank's state of knowledge in
26 Wygle's affidavit is in her paragraph 8 and the attached exhibit G which shows excerpts
of pages 92-96 of the deposition of Bruce Hunsaker and attaches Exhibit 10, the
commercial loan memorandum produced to the Plaintiff in discovery, which were the
documents produced to the Senior Loan Committee. These excerpts and the exhibit are

1 consistent with, and in the case of the exhibit the basis for, the Response to Interrogatory
2 No. 7.

3 What the Wygle affidavit fails to establish is the fact that the contract was in the
4 loan officer's shadow file, even though the document had been produced by D.L. Evans
5 in discovery, or the date that it was included in the file. Without specific evidence
6 establishing both the fact of the contract being in D.L. Evans Bank's file, and the actual
7 date that it was received by D.L. Evans Bank, the Court could not find that the facts set
8 forth in Request for Admission No. 2 had been proven. Inferences in favor of the moving
9 party cannot be drawn in a summary judgment motion. Without evidence that the
10 contract was in the file, there is no basis for an inference at all. It would be pure
11 speculation as to what D.L. Evans Bank's state of knowledge was beyond that
12 specifically set forth in the Wygle Affidavit. Failure to offer proof does not meet the
13 requirement of IRCP 37(d). Furthermore, offering six pages out of one hundred and thirty
14 of the Hunsaker affidavit as a basis for the finding hardly justifies a sixteen thousand
15 dollar attorney fee award.
16

17 IRCP 37 (c) provides four exceptions to an award of fees. Two are applicable
18 here. Exception number three allows a party to not admit where it has reasonable grounds
19 to believe that the party might prevail on the matter. Because of the language of Request
20 for Admission No. 2 and the state of D.L. Evans Bank's file, absent specific proof of
21 when the purchase and sale agreement was placed in the loan officer's file, a conclusion
22 that it was in the file prior to the closing date would require an inference be drawn. If the
23 finding is to be based upon inference, then the inference can go either way.
24

25 The second applicable exception is number four, where there is a good reason for
26 the failure to admit. When D.L. Evans Bank responded to Interrogatory No. 7,

1 specifically setting forth the basis for the denial and also the evidence in its file tending
2 or actually showing knowledge and the express admission that the senior loan committee
3 was aware of the Benz transaction and some of its terms, it admitted the facts established
4 and provided detail beyond the request for admission. Under the circumstances that
5 response fully met the intent and policy of responding to a request for admission.
6

7 III.

Benz's Claimed Expenses.

8 IRCP 37(c) allows recovery of attorney's fees only for "the reasonable expenses
9 incurred in making that proof." The first obvious point being that Benz did not prove the
10 specific fact Request For Admission No. 2 put forward.. In reviewing the claimed
11 expenses you cannot go to the record and compare what actually was done in making the
12 proof for the claimed hours. What is clear, is that Benz seeks to recover for everything
13 dealing with discovery and summary judgment including the research and briefing. A
14 simple review of the briefing and of the actual material submitted in the Wygle affidavit
15 establish clearly that the bulk of the matters addressed dealt with other issues. Submitted
16 with this memorandum, is the affidavit of R.C. Stone, which has attached Benz' original
17 discovery requests. These also clearly establish that the bulk of the materials requested
18 had nothing to do with Request for Admission No. 2.
19
20

21 Benz did no additional discovery after Request for Admission No. 2 was denied
22 except the deposition of Bruce Hunsaker. In that deposition, Wygle refers to only six
23 pages out of one hundred and thirty total. Any argument the denial required additional
24 discovery is disproved by the absence of discovery after the denial.

25 By date, D.L. Evans Bank objects to the requested expenses as follows:
26

1 9/17/09 Reviewing the Bank's response to the Request for
2 Admissions had nothing to do with proving a fact. That
3 expense would have been incurred equally if the Request for
4 Admission No. 2 had been admitted. It was not a
5 consequence of the failure to admit.
6
7 10/15/09 This call had nothing to do with proving a fact. It too would
8 have been incurred regardless as to whether or not Request
9 for Admission No. 2 had been admitted.
10
11 11/4/09 These documents were produced in response to the
12 Plaintiff's initial discovery request, which included Request
13 for Admission No. 2. These documents would have been
14 produced whether or not Request for Admission No. 2 was
15 admitted. The scope of the discovery request went well
16 beyond matters relating to Request for Admission No. 2 and
17 necessitated a very large production of documents. There is
18 nothing in the record to establish that this review of
19 documents would not have been necessary but for the
20 denial. There is further nothing in the record to establish
21 which, if any, of those documents related to D.L. Evans
22 Bank's state of knowledge. If they did relate to D.L. Evans
23 Bank's state of knowledge it would obviate the necessity of
24 proof.
25
26 11/5/09 Same objection as made for 11/4/09 applies to this claimed
expense. If a party is to recover for proof of a specific fact, it
is essential that they be able to identify, specifically, what
was done for that fact versus other facts. Evidence would
need to be sorted even if Request for Admission No. 2 had
been admitted there were many issues to be addressed, and
Request for Admission No. 2 was not dispositive of all of
the issues presented.
11/6/09 A Motion to Compel is not proof of a fact. Recovery of
attorney's fees for a motion to compel does not fall within
IRCP 37(d) it falls under IRCP 37(a).
11/29/09 Reviewing D.L. Evans Bank's responses to interrogatories
does not prove a fact. That review was necessary regardless
of whether Request for Admission No. 2 was admitted.
Similarly, researching the effect of D.L. Evans Bank's
knowledge is not proof of a fact. If the fact is established
one still needs to have the legal basis for demonstrating to
the Court the effect of the fact on the Court's decision
process.

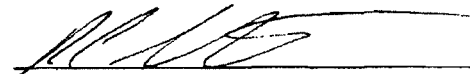
- 1
2 11/29/09 At the time this billing is made D.L. Evans Bank had
3 responded to Interrogatory No. 7 specifically advising Benz
4 of D.L. Evans Bank's state of knowledge and of the records
5 in its file relating to that state knowledge, all of which had
6 been produced. While it does not appear in the record, the
7 documents included the purchase and sale agreement for the
8 ground by Rutherford, the Benz purchase and sale
9 agreement, both of which appeared in the loan officer's
10 shadow file and the minutes of the Senior Loan Committee.
11 That's all. That's all there was then. That's all there is now.
12 That was all of the evidence available to show the state of
13 knowledge. Two of the documents, the two purchase and
14 sale agreements, were already in Benz's possession. It could
15 not conceivably take three hours to review, sort and
16 organize a couple of pages of senior loan committee notes.
- 17 11/30/09 Same objection as to the two 11/29/09 claims.
- 18 12/7/09 This references a conference with Ms. Benz
19 regarding Benz's deposition. This has nothing to do
20 with proof by Benz of D.L. Evans Bank's
21 knowledge. It relates to Benz's knowledge of D.L.
22 Evans Bank's loan, not vice-versa.
- 23 1/14/10 Only six pages of the Hunsaker deposition was offered to
24 the Court, which related directly or indirectly to the
25 response to Request for Admission No. 2. Extensive
26 excerpts were submitted to the Court relating to other
issues. To the extent that there had been any content in that
deposition, which might have been used to prove the fact of
knowledge, it was not used. Even if it were, it would not be
appropriate to treat the whole deposition as an expense of
proving that single fact. All Benz had to do to "prove" the
fact was submit the Response to Interrogatory No. 7.
- 1/31/10 Same objection as the 1/14/10 claim.
- 2/1/10 Same objection as the 1/14/10 claim.
- 2/2/10 Same objection as 11/4/09 claim and 1/14/10 claim. In
addition, Benz used only six pages from the Hunsaker
Deposition to establish notice.
- 2/12/10 Same objection as 2/11/10 claim.
- 2/17 and Same objection as 2/2/10 claim. No documents were

1	20/09	submitted to the Court from D.L. Evans Bank's document productions establishing notice and knowledge of contract.
2		
3	2/24/10	Same objection as 2/17 and 20/09 claim.
4	3/2/10	IRCP 37(d) does not allow for recovery of expenses of briefing and obtaining summary judgment, only of proving a fact denied. Presenting the law to the Court would be necessary in a summary judgment motion irrespective of whether or not Request for Admission No. 2 had been admitted.
5		
6		
7		
8	3/5/10	Same objection as 3/2/10 claim.
9	3/25/10	Same objection as 3/2/10 claim.
10	3/29/10	The affidavit submitted in support of the motion for summary judgment only minimally addresses notice or knowledge. Since the affidavit does not address the fact in Request for Admission No. 2, it is not proof of a fact not referred to.
11		
12		
13		
14	3/30/10	Same objection as 3/29/10 claim.
15	4/1/10	Same objection as 3/29/10 claim.
16	4/2/10	Same objection as 3/2/10 claim. IRCP Rule 37(d) does not authorize recovery of expenses for bringing a summary judgment motion or noticing it for hearing.
17		
18	4/22/10	IRCP Rule 37(d) does not authorize an award of expenses for reading a responsive summary judgment brief or a reply brief. It allows only recovery for proof of a fact.
19		
20		
21	4/23/10	Same objection as 4/22/10 claim.
22	4/26/10	Same objection as 4/22/10 claim. This also bills for reviewing the Defendant's pretrial statement. Reviewing a pretrial statement does not fall within IRCP 37(d).
23		
24	4/29/10	IRCP 37(d) does not allow for recovery expenses for preparing pre-trial conference memorandums.
25		
26	5/3/10	Same objection as 4/2/10 claim.
	5/12/10	IRCP 37(d) does not allow for recovery of drafting an order.

1 5/17/10 IRCP 37(d) does not allow for recovery of expenses for
2 preparing a memorandum of costs and request for attorney's
3 fees or research relating to such a memorandum.
4 5/27/10 Same objection as 5/17/10 claim.
5 6/15/10 Same objection as 5/17/10 claim.
6 6/29/10 Same objection as 5/17/10 claim.
7 7/6/10 Same objection as 5/17/10.

8
9 DATED this 23 day of July, 2010.

10 PARSONS, SMITH, STONE,
11 LOVELAND & SHIRLEY, LLP

12 
13 R.C. Stone
14 Attorneys for Plaintiff
15 137 West 13th Street
16 P.O. Box 910
17 Burley, Idaho 83318
18
19
20
21
22
23
24
25
26

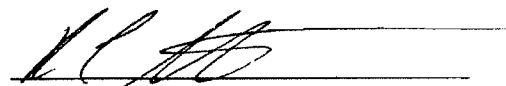
CERTIFICATE OF DELIVERY

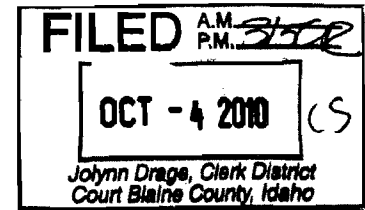
I hereby certify that on the 23 day of July, 2010, I served a copy of the foregoing
MEMORANDUM IN OPPOSITION TO IRCP 37(c) MOTION upon the following named
person(s) in the manner listed below:

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD &
RITZAU, P.A.
PO Box 1172
Ketchum, ID 83340

☒ Via United States Mail
☐ Via Facsimile
☐ Via Overnight Carrier
☐ Via Hand Delivery

PARSONS, SMITH, STONE,
LOVELAND & SHIRLEY, LLP


R.C. Stone
Attorneys for Plaintiff
137 West 13th Street
P.O. Box 910
Burley, Idaho 83318



IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR BLAINE COUNTY

LESLIE BENZ,

Plaintiff,

vs.

EAST AVENUE BLUFF, LLC, an Idaho
limited liability company; D.L. EVANS
BANK; TIMELESS DESIGN COMPANY;
CLIFF R. IVERSON d.b.a. LEI'S CUSTOM
TILE; FISHER APPLIANCE, INC.;
VIEWPOINT, INC.; CAD DRAFTING
SYSTEMS, INC.; BUCKHORN ELECTRIC,
LLC/DEVILAN HAIRE; A.C. HOUSTON
LUMBER COMPANY; MIKE PUNNETT;
PRECISION PLUMBING, INC.; WATSON
BULDERS, INC.; HARRIS
REFRIGERATION HEARING AND
ELECTRIC; FERGUSON ENTERPRISES,
INC.; ROCKY MOUNTAIN HARDWARE,
INC.; SWEET'S PORTABLE WASTE
SERVICES, LLC; WHITE BUILDERS, LLC;
MIKE'S WELDING AND METAL WORKS,
LLC; SENTINEL FIRE & SECUTIRY, INC.;
STEVE McCOY, d.b.a. McCOY'S
PAINTING; CHRISTOPHER BRENNAN
d.b.a. BRENNAN'S CARPET; and PAUL
COPPER d.b.a. SUN VALLEY DRYWALL,

Defendants.

Case No.: CV-2009-613

DECISION ON ATTORNEY FEES FOR
FAILURE TO ADMIT PURSUANT TO
RULE 37(c)

Appearances: Jan Wygle, Ketchum, for the plaintiff Leslie Benz

R.C. Stone, Burley, for the defendant D.L. Evans Bank

PROCEDURAL HISTORY

During the course of discovery, Plaintiff Leslie Benz asked D.L. Evans Bank (Bank) to admit that it “knew or should have known the terms of the purchase and sale contract between East Avenue Bluff LLC (EAB) and Leslie Benz, including the payment release provisions and dates, prior to closing on its loan to East Avenue Bluff LLC.” The Bank responded that, based upon its current document review, “there is no basis for admitting that D.L. Evans Bank knew or should have known the terms” of the contract. “The senior loan committee was advised of the fact that a sale existed and some of its terms, but the contract itself was not presented to the senior loan committee and the Bank’s documentation, to this point of the review, has not established that the contract itself was received by the Bank prior to the closing of the loan.” The answer went on to recite that the loan officers involved no longer worked for the Bank, and the Bank was attempting to obtain information from them relating to this transaction. This answer was never supplemented or amended.

Benz brought a Motion for Summary Judgment, and the court ruled that the Bank knew or should have known of the Benz/East Avenue Bluff contract prior to the closing of the Benz/EAB loan. Benz later moved for an award of attorney fees pursuant to I.R.C.P. 37(c) for the Bank’s failure to admit. This motion was argued before the court on August 2, 2010, at which time the court ruled on the record that Benz was entitled to fees for a failure to admit, and took under advisement the amount of fees to be awarded.

Some degree of detail is required to give this award of attorney fees context. The Bank has predicated its position that it “lacked knowledge” of the contract or its terms prior to closing the Benz/EAB loan because (1) neither the Bank nor Benz has been able to establish the precise date upon which the contract was received by the Bank’s loan officer and placed in the Bank’s files, and (2) although a copy of the Benz/EAB contract was located in the Bank’s files at some

point, the actual contract itself was not presented to *the senior loan committee* prior to the loan closing.

The court has determined that the Bank's lack of knowledge occurred because its senior loan committee failed to conduct an adequate inquiry to determine if the Bank indeed had a copy of the contract in its possession. At the time, it did not seem important to the Bank's committee. If it had done so, the Bank would have known whether a copy of the contract existed in the Bank's files in some outlying location prior to the loan closing. It is not incumbent on Benz to show precisely when a copy of the contract arrived in the Bank's possession. It is the state of the Bank's knowledge which is critical, not necessarily when a copy of the contract arrived in a given location. The court has also rejected the Bank's position that if the *senior loan committee* did not have possession of a copy of the Benz/EAB contract, the Bank lacked knowledge that any such contract existed, or its terms. In general, knowledge of an agent is imputed to the principal. The Bank admits the senior loan committee had knowledge "that a sale existed and some of its terms." They failed to look any further. Instead, they predicated their lack of knowledge, and the consequent denial of the requested admission, on the fact that they did not find what they never looked for.

The court cannot find that this process gave the Bank a "good reason for failure to admit" or that the Bank had "reasonable ground to believe that the party might prevail on the matter" in the words of Rule 37(c). Large entities should not be protected from their failure to know of, or conduct reasonable inquiry into, what they possess.

Following the Bank's denial as to its state of knowledge, counsel for Benz undertook to find out what the Bank knew or should have known.¹ Ultimately, she did so, and proved those

¹The Bank has also contended that "we admitted all the *facts* we knew of, and how we came by them" in their answer to the Request for Admission, and therefore it admitted all that was required. While it may be true the Bank made those admissions, I.R.C.P. 36(a) is not limited solely to admissions regarding factual matters. It provides specifically that a request may be made for the admission of "the truth of any matters within the scope of Rule 26(b)...that relate to statements or opinions of fact *or of the application of law to fact*..."

facts, and the application of law to those facts, to the satisfaction of the court. The court agrees on these facts that Benz is entitled to fees. The Bank has contested the amount of those fees, as well as Benz's entitlement to them. Both sides direct particular attention to the fees claimed for going through the Bank's documents turned over in the course of discovery. The Bank claims Benz would have had to review those documents in any event. Benz contends that a thorough review of those documents was necessary in order to obtain the "smoking gun," that small kernel of evidence which made her case, and which would not have been necessary if the Bank had simply admitted what it knew, or that the facts in its possession amounted to "knowledge."

ANALYSIS AND CONCLUSIONS

The court has previously determined that Benz is entitled to attorney fees and costs for the Bank's failure to admit. In reviewing the fee request, the court takes notice of *Ruge v. Posey*, 114 Idaho 890, 761 P.2d 1242 (Ct. App. 1988), cited by Benz. In *Ruge*, the Court of Appeals noted an award of fees pursuant to Rule 37(c) is mandatory, subject to the four exceptions set forth in the rule itself. The court also held that it was improper for the district court, in a trial involving claims of punitive damages, gross negligence and ordinary negligence, where the defendant had denied a request to admit it was the proximate cause of plaintiff's injuries, to determine that plaintiff suffered no additional expense as a result of the failure to admit.² "We reiterate, however, that the judge may not refuse to make an award solely because the expenses of proving the matter contained in the requests for admission might also have been incurred with respect to another issue." *Id.* at 892.

This case has direct application here. The Bank contends that even if they had admitted knowledge, Benz would still have had to file for summary judgment, set the matter for hearing,

² The district court concluded the plaintiff had to prove gross negligence, and they would have had to prove the same things on the way to establishing their claim for punitive damages. Thus, plaintiff was not harmed by a failure to admit. This was held to be error.

and attend oral argument, etc., so that those costs are not recoverable. The Bank also argues that Benz's Request for Production of Documents was submitted without regard to the Bank's admissions, and Benz would have conducted a review of those documents, and incurred the costs in so doing, in any event. Benz responds that a proper admission by the Bank would have encompassed both the factual and legal questions, which the Bank steadfastly failed to admit even after it had knowledge of all the facts, and would have cut down tremendously on the amount of work required to prove her points for summary judgment. The court concludes these arguments go to the amount of fees to be awarded Benz, rather than an entitlement to fees, and will address them further below.

Turning to the specific request for fees for specific work conducted, the court determines as follows:

9/17/09—Disallowed. These fees would have been incurred even if request admitted; not a consequence of a failure to admit.

10/15/09—Disallowed for same reason.

11/4/09—These fees are allowed. Although there is some argument that counsel for Benz asked for discovery that went way beyond the request for admissions, the fact remains that Ms. Wygle and her paralegal had to sift through 1200 pages of documents to find what they needed in order to prove "knowledge."

11/5/09—These fees are allowed for same reasons as 11/4/09 fees.

11/6/09—A motion to compel answers to interrogatories propounded by Benz. These are disallowed. There is no showing how these answers are connected to a failure to admit.

11/29/09—These fees are allowed in part. This particular request is a close call. The court considers the bulk of this request to be for research. It is one thing if Ms. Wygle is researching the effect of a full admission of "knowledge" by the Bank; it may be quite another to research the effects of a partial admission or partial facts upon an ultimate conclusion. Given this is not a well-travelled area of law the court cannot say that this research was not necessary on these points. The objections and responses to interrogatories are not relevant to the admissions issue. The court will allow \$900 for research on this date.

11/29/09—Also allowed. Although the Bank may have produced all the documents by then, they still needed to be sorted and reviewed.

11/30/09—These fees are disallowed. Too remote to the issue of admission.

12/7/09—This request for fees relates to Benz's deposition and Benz's knowledge, not the Banks' knowledge, and are disallowed.

12/8/09—Fees are disallowed for same reason as 12/7 fees.

1/14/09—Fees allowed for the notice of deposition of Hunsaker and the Duces Tecum (6) The court is mindful of Bank's objections that follow that set forth that only a small part of Hunsaker's deposition was ever used.

1/31/10—It appears counsel has only billed for ½ the time spent re the Hunsaker deposition, which is reasonable. Allowed.

2/1/10—Allowed for same reason as 1/31/10.

2/2/10—Disallowed. No showing how this related to request for admission.

2/11/10—Allowed. No objection.

2/12/10—Allowed.

2/17/10 and 2/20/10—This appears to be additional document review by paralegal on request for production. Per the Bank, the major document production had already occurred and Benz had all the pertinent information she was going to get, and had taken Hunsaker's deposition. Disallowed.

2/24/10—Disallowed for same reason as 2/17 and 2/20.

3/2/, 3/5/, 3/25/, 3/29/, 3/30, 4/1 and 4/2/10—This is the part where Benz had to prove her facts and the Bank's knowledge to the court. This is the difference between having to prove a fact and being able to rely on an admission. *See, Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001). Although it is true the motion would have to be brought under either circumstance, the court agrees with Benz that the amount and degree of work required could vary significantly. The court also agrees with Bank's position that the only issue upon which Benz is entitled to fees is the one involving the Bank's failure to admit, and the resulting work in obtaining records and proving *what the Bank failed to admit*; that is, Benz is not entitled to attorney fees for bringing a summary judgment which encompasses other work and/or proving Benz's entire case. For example, fees incurred by Benz in reading a reply brief from Bank on 4/22/10 are not related to Benz proving the fact at issue. Fees for 3/2, 3/5, 3/25, 3/29, 3/3/, 4/1 and 4/2 are allowed because (1) they relate to proving the fact the bank failed to admit, and (2) it is clear that counsel has identified that she is charging for only a portion of the work she has done on those days.

4/22, 4/23, 4/26, 4/29—These are all disallowed because they are fees incurred in reviewing and responding to Bank's summary judgment arguments. They cannot possibly be required to *prove* the Bank's knowledge.

5/3/10—Counsel has only charged a portion of her time attending the summary judgment hearing. Certainly, a goodly portion of the argument was dedicated to the Bank's knowledge, or lack thereof. These fees are allowed.

5/12—Disallowed. These fees were not incurred in *proving* what the bank failed to admit.

5/17/10—Allowed. These were fees for making a request, *in part*, for attorney fees pursuant to Rule 37(c) (1.9 of 8.3 total hours). The rest, presumably, was counsel's general request for fees. Rule 37(c) permits the recovery of attorney fees incurred in *making the required proof*, but is not clear whether a party can request fees incurred in *making the fee request* pursuant to Rule 37(c). Here, that consumed 1.9 hours. It would be an anomaly to disallow a reasonable fee required to collect a fee award. It is the court's practice to award fees in the general case which are incurred preparing affidavits and memorandums and attending hearings required to cement a fee award otherwise owed pursuant to statute or rule of court.

5/27, 6/15, 6/29/10—Disallowed. Not connected to Rule 37(c) award.

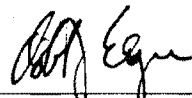
7/6/10—These are fees required to cement the Rule 37(c) award of fees. Extra work was required because the court agreed with the Bank that a separate proceeding was required to collect fees pursuant to Rule 37(c). These fees are allowed.

The allowed fees yield a total of \$9,915. Although Ms. Wygle's fees are high, the court finds them to be in line with the prevailing rates in this area for the more experienced counsel.

The court approves Benz's request for fees in the sum of \$9,915.

IT IS SO ORDERED.

Dated this 29 day of September, 2010



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of ^{Oct.}~~September~~, 2010, I caused to be served a true copy of the foregoing ORDER, document by the method indicated below, and addressed to each of the following:

Janet C. Wygle
Luboviski, Wygle, Fallowfield & Ritzau, PA
PO Box 1172
Ketchum, ID 83340

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ FAX

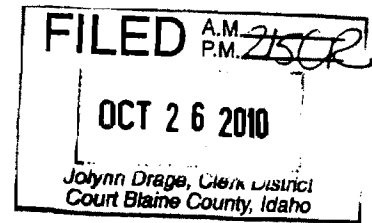
R.C. Stone
Parsons, Smith & Stone, LLP
137 West 13th Street
PO Box 910
Burley, ID 83318

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ FAX



Deputy Clerk

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
Suite 205, The Station
460 Sun Valley Road
P.O. Box 1172
Ketchum, Idaho 83340
Tel: 208/726-8219
Fax: 208/726-3750
ISB# 2232
Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,)	
	)	Case No. CV-2009-613
Plaintiff,)	
	)	ORDER:
v.	)	1) MAKING ADDITIONS TO
	)	AND DELETIONS FROM
	)	THE CLERK'S RECORD;
EAST AVENUE BLUFF, LLC, an Idaho limited	)	2) CORRECTING THE CURRENT
liability company; D.L. EVANS BANK;	)	TRANSCRIPT; and
<i>et al.</i>	)	3) FOR ADDITIONAL
	)	TRANSCRIPT OF HEARINGS
Defendants.)	

THE ABOVE-IDENTIFIED MATTERS HAVING COME BEFORE THIS COURT upon the Defendant's Objection and the subsequent Stipulation of the Plaintiff, Leslie Benz ("Benz"), by and through her attorney of record, Janet C. Wygle of Luboviski, Wygle, Fallowfield & Ritzau, P.A., and the Defendant, D. L. Evans Bank ("D.L. Evans), by and through its attorney of record, R.C. Stone, of Parsons, Smith, Stone, Loveland & Shirley, LLP, and it appearing to the Court that such Stipulation complies with Rule 29(a) of the Idaho Appellate Rules, and good cause appearing,

IT IS HEREBY ORDERED as follows:

ORDER SETTLING CLERK'S RECORD AND TRANSCRIPT/1

1. That the following documents be deleted from the Clerk's Record on Appeal:

<u>Document Title</u>	<u>Pages</u>
a. Default Judgment Against Certain Defendants	Pages 36-38
b. Default Judgments Against Certain Defendants	Pages 39-42

2. That the following documents be added to the Clerk's Record on Appeal:

<u>Document Title</u>	<u>Date</u>
a. Lis Pendens	08/11/2009
b. Stipulation Regarding Trustee's Sale	01/26/2010
c. Order Regarding Trustee's Sale	01/27/2010
d. Affidavit of Janet Wygle's Interest Calculation for Order of Summary Judgment	5/14/2010
e. Memorandum of Costs and Affidavit of Attorney's Fees and Costs	05/18/2010
f. Objection to Plaintiff's Motion for Summary Judgment. (Actual title of the pleading is "Objection to Plaintiff's Order of Summary Judgment")	05/20/2010
g. Motion to Disallow Costs	05/27/2010
h. Objection to Interest	05/27/2010
i. Memorandum in Opposition to Request for Attorneys Fees and Prejudgment Interest	05/27/2010
j. Responsive Brief in Support of Request for Attorneys Fees and Costs and Prejudgment Interest	06/18/2010
k. Motion for Attorney's Fees Pursuant to I.R.C.P. Rule 37(c) And Notice of Hearing Thereon.	07/12/2010
l. Affidavit of Janet C. Wygle in Support of Motion	07/12/2010

For Attorney's Fees Pursuant to I.R.C.P. Rule
37(c)"))

- m. Order on Application for Costs and on Objections To Attorney's Fees and Interest 07/12/2010
- n. Brief in Support of Motion for Attorney's Fees. Pursuant to I.R.C.P. Rule 37(c)")) 07/23/2010
- o. Affidavit of R.C. Stone in Opposition to IRCP 37(c) Motion 07/23/2010
- p. Memorandum in Opposition to IRCP 37(c) Motion 07/26/2010
- q. Affidavit of R.C. Stone in opposition to IRCP 37(c) Motion 07/26/2010
- r. Decision on Attorney's Fees for Failure to Admit Pursuant to Rule 37(c) 10/04/2010

Any subsequent order on Rule 37(c) motion that the Court has yet to enter.

3. That the following corrections be made to the Current Transcript:

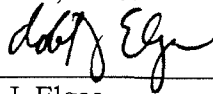
- a. In the index it identifies argument by Mr. Parsons at pages 5, 15, and 35. The correct identification is Mr. Stone.

4. That the following additions be made to the Transcript at Defendant's cost:

- a. D.L. Evans Bank requests a transcript also be prepared of the proceedings before the Court on June 29, 2010 for hearing on the Defendant's Motion to Disallow Costs.
- b. D.L. Evans Bank requests additional transcript of the proceedings of 08/02/2010 at 11:00 a.m. for hearing on the Plaintiff's I.R.C.P. 37(c) Motion.

5. The hearing on these matters set for October 25, 2010 at 1:30 p.m. is vacated.

DATED this 21 day of October, 2010.



Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of October, 2010, I served a true and correct copy of the within and foregoing document upon the attorneys named below in the manner noted:

Janet C. Wygle
LUBOVISKI, WYGLE, FALLOWFIELD & RITZAU, P.A.
P.O. Box 1172
Ketchum, Idaho 83340

R.C. Stone
PARSONS, SMITH, STONE, LOVELAND & SHIRLEY, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318

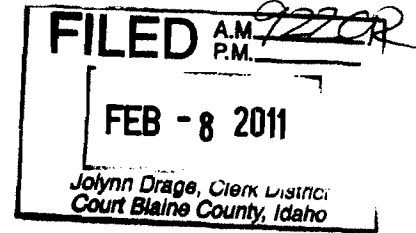
/ By depositing copies of the same in the United States mail, postage prepaid, at the post office at Hailey, Idaho.

 By hand delivering copies of the same to the offices of the attorney.

 By transmitting copies of the same to said attorney by facsimile machine process.


Clerk of the District Court

Janet C. Wygle
LUBOVISKI, WYGLE,
FALLOWFIELD & RITZAU, P.A.
 Suite 205, The Station
 460 Sun Valley Road
 P.O. Box 1172
 Ketchum, Idaho 83340
 Tel: 208/726-8219
 Fax: 208/726-3750
 ISB# 2232
 Attorneys for Plaintiff



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,

 Plaintiff,

v.

EAST AVENUE BLUFF, LLC, an Idaho limited
 liability company; D.L. EVANS BANK;
 TIMELESS DESIGN COMPANY; CLIFF R.
 IVERSON dba LEI'S CUSTOM TILE; FISHER
 APPLIANCE, INC.; VIEWPOINT, INC.; CAD
 DRAFTING SYSTEMS, INC.; BUCKHORN
 ELECTRIC, LLC/DEVILAN HAIRE; A.C.
 HOUSTON LUMBER COMPANY; MIKE
 PUNNETT; PRECISION PLUMBING, INC.;
 WATSON BUILDERS, INC.; HARRIS
 REFRIGERATION HEATING AND ELECTRIC;
 FERGUSON ENTERPRISES, INC.; ROCKY
 MOUNTAIN HARDWARE, INC.; SWEET'S
 PORTABLE WASTE SERVICES, LLC; WHITE
 BUILDERS, LLC; MIKE'S WELDING AND
 METAL WORKS, LLC; SENTINEL FIRE &
 SECURITY, INC.; STEVE McCOY, dba
 McCOY'S PAINTING; CHRISTOPHER
 BRENNAN dba BRENNAN'S CARPET; and
 PAUL COOPER dba SUN VALLEY DRYWALL,

 Defendants.

Case No. CV-2009-613

SECOND
 AMENDED JUDGMENT

WHEREAS on July 12, 2010 this Court entered its ORDER ON APPLICATION FOR COSTS AND ON OBJECTIONS TO ATTORNEY'S FEES AND INTEREST awarding Plaintiff her Costs in the sum of \$1,695.27, plus her pre-judgment interest in the sum of \$111,207.58; and

WHEREAS on October 4, 2010, this Court entered its Decision on Attorney Fees For Failure to Admit Pursuant to Rule 37(c) awarding Plaintiff attorney's fees in the sum of \$9,915.00;

NOW, THEREFORE, a SECOND AMENDED JUDGMENT is hereby entered in favor of the Plaintiff for her costs of right in the sum of \$1,075.05, and her discretionary costs in the sum of \$620.22, plus pre-judgment interest on her Vendee's Lien amount of \$750,000.00 at the rate of twelve percent (12%) per annum from February 6, 2009 to May 3, 2010, in the amount of \$111,207.58, plus her Attorney's Fees in the sum of \$9,915.00, for an amended total Vendee's Lien amount of \$872,817.85, which lien has priority over the deed of trust lien of Defendant D. L. Evans Bank and the liens of all other defendants on Lot 3 in Block 41 of the City of Ketchum, Blaine County, Idaho. This total judgment amount shall accrue interest at the legal rate for judgments of 5.625% per annum from May 3, 2010 until paid in full.

DATED this 4 day of February, 2011.



Robert J. Elgee
Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of February, 2011, I served a true and correct copy of the within and foregoing document upon the attorneys named below in the manner noted:

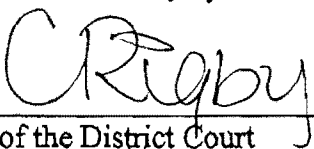
Janet C. Wygle
LUBOVISKI, WYGLE, FALLOWFIELD & RITZAU, P.A.
P.O. Box 1172
Ketchum, Idaho 83340

R.C. Stone
PARSONS, SMITH & STONE, LLP
137 West 13th Street
P.O. Box 910
Burley, ID 83318

X By depositing copies of the same in the United States mail, postage prepaid, at the post office at Ketchum, Idaho.

 By hand delivering copies of the same to the offices of the attorney.

 By transmitting copies of the same to said attorney by facsimile machine process.


Clerk of the District Court

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LESLIE BENZ,)	
	)	Supreme Court No. 37814
Plaintiff/ Respondent,)	
	)	CERTIFICATE OF SERVICE
vs.)	
)	
D.L. EVANS BANK,)	
)	
Defendants/ Appellant.)	
_____)	

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Supplemental Clerk's Record and Supplemental Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Janet C. Wygle
PO Box 1172
Ketchum, Idaho 83340

Plaintiff / Respondent

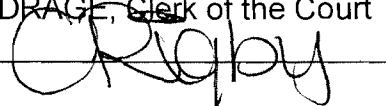
R.C. Stone
P.O. Box 910
Burley, Idaho 83318

Defendant / Appellant

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this
21 day of January, 2011.

JOLYNN DRAGE, Clerk of the Court

By



Crystal Rigby, Deputy Clerk